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No. 2306

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United States  
**Circuit Court of Appeals**  
For the Ninth Circuit.

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SHERMAN-CLAY & COMPANY,  
a Corporation,  
Plaintiff in Error,

vs.

SEARCHLIGHT HORN COMPANY,  
a Corporation,  
Defendant in Error.

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**Book of Exhibits.**

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Upon Writ of Error to the United States District Court  
for the Northern District of California,  
Second Division.

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**FILED**

OCT 31 1913





Records of M. S. Court

1891

236





No. 2306

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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SHERMAN-CLAY & COMPANY,  
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[Plaintiff's Exhibit No. 1—Letters Patent No. 771,441 to P. C. Nielsen, Patented October 4, 1904.]

No. 771,441.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents shall Come:

Whereas Peter C. Nielsen, of Greenpoint, New York, has presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in

Horns for Phonographs or Similar Machines, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of Law in such cases made and provided, and

Whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law.

Now therefore these Letters Patent are to grant unto the said Peter C. Nielsen, his heirs or assigns for the term of Seventeen years from the fourth day of October, one thousand nine hundred and four, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this fourth day of October, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-ninth.

[Seal]

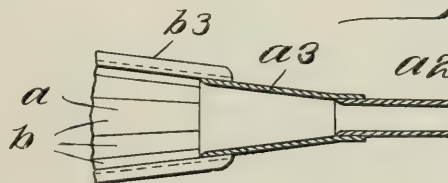
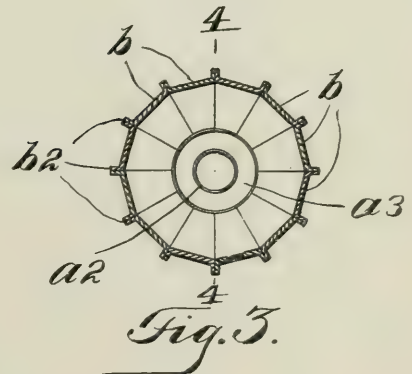
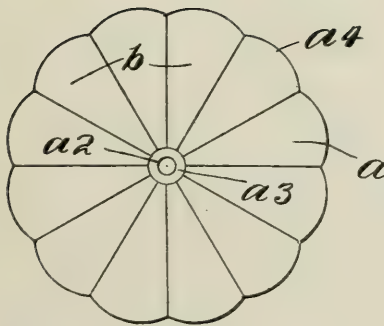
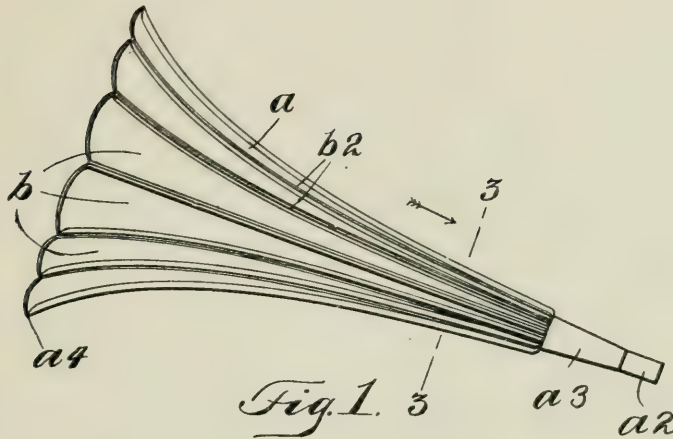
F. I. ALLEN,  
Commissioner of Patents.

P. C. NIELSEN.

HORN FOR PHONOGRAPHS OR SIMILAR MACHINES.

APPLICATION FILED APR. 14, 1904.

NO MODEL.



WITNESSES

*Al. Mattingly*  
*F. A. Stewart*

*Fig. 4.*

BY

INVENTOR

*Peter C. Nielsen,*  
*Edgar & Co*

ATTORNEYS





PETER C. NIELSEN, OF GREENPOINT, NEW YORK.

## HORN FOR PHONOGRAPHS OR SIMILAR MACHINES.

SPECIFICATION forming part of Letters Patent No. 771,441, dated October 4, 1904.

Application filed April 14, 1904. Serial No. 203,080. (No model.)

*To all whom it may concern:*

Be it known that I, PETER C. NIELSEN, a citizen of the United States, residing at Greenpoint, in the county of Kings and State of New York, have invented certain new and useful Improvements in Horns for Phonographs or Similar Machines, of which the following is a specification, such as will enable those skilled in the art to which it appertains to make and use the same.

This invention relates to the horn of a phonograph or other machine of this class; and the object thereof is to provide a horn for machines of this class which will do away with the mechanical, vibratory, and metallic sound usually produced in the operation of such machines, and also produce a full, even, and continuous volume of sound in which the articulation is clear, full, and distinct.

The invention is fully disclosed in the following specification, of which the accompanying drawings form a part, in which the separate parts of my improvement are designated by suitable reference characters in each of the views, and in which—

Figure 1 is a side view of my improved phonograph-horn; Fig. 2, an end view thereof; Fig. 3, an enlarged section on the line 3 3 of Fig. 1, and Fig. 4 a longitudinal section on the line 4 4 of Fig. 3.

In the practice of my invention I provide a horn *a*, provided at its smaller end with the usual nozzle-piece *a*<sup>1</sup>, by means of which connection is made with the machine, and in the form of construction shown a supplemental piece *a*<sup>3</sup> is employed between the larger or body portion of the horn and the nozzle-piece *a*<sup>1</sup>; but the parts *a*<sup>3</sup> and *a*<sup>2</sup> may be formed integrally, if desired, and may be constructed in any desired manner. The main part *a* of the horn is bell-shaped in form and tapers outwardly gradually from the part *a*<sup>3</sup> to the larger or mouth end *a*<sup>4</sup>, and this curve or taper is greater or more abrupt adjacent to said larger or mouth end. The body portion of the horn is also composed of a plurality of longitudinal strips *b*, which are gradually tapered from one end to the other, and which are connected longitudinally, so as to form longitudinal ribs *b*<sup>2</sup>, each of the strips *b* being provided at

its opposite edges with a flange *b*<sup>3</sup>, and these flanges of the separate strips *b* are connected to form the ribs *b*<sup>2</sup>. The body portion of the horn or the strips *b* are composed of sheet metal, and it will be observed that the inner wall of the body portion of said horn in cross-section is made up of a plurality of short lines forming substantially a circle, and it is the construction of the body portion of the horn as hereinbefore described that gives thereto the qualities which it is the objects of this invention to produce, which objects are the result of the formation of the horn or the body portion thereof of longitudinal strips *b* and providing the outer surface thereof with the longitudinal ribs *b*<sup>2</sup> and curving the body portion of the horn in the manner described. If desired, the part *a*<sup>3</sup> may be formed integrally with the body portion of the horn, in which event the ribs *b*<sup>2</sup> would extend to the nozzle or connecting portion *a*<sup>2</sup>, and it is the longitudinal ribs *b*<sup>2</sup> which contribute mostly to the successful operation of the horn, said ribs serving to do away with the vibratory character of horns of this class as usually made and doing away with the metallic sound produced in the operation thereof.

My improved horn may be used in connection with phonographs or other machines of this class, and changes in and modifications of the construction described may be made without departing from the spirit of my invention or sacrificing its advantages.

Having fully described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, substantially as shown and described.

2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips

are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, said strips being tapered from one end of said horn to the  
5 other, substantially as shown and described.

3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally-arranged strips secured together at  
10 their edges and the outer side thereof at the

points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.

In testimony that I claim the foregoing as  
15 my invention I have signed my name, in presence of the subscribing witnesses, this 13th day of April, 1904.

PETER C. NIELSEN.

Witnesses:

F. A. STEWART,  
C. J. KLEIN.



[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Pltffs. Exhibit 1. Oct. 1, '12. W. B. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 1. Received Aug. 19, 1913. F. D. Monekton, Clerk.



**[Defendant's Exhibit "A"—Letters Patent No. 72,422, to George S. Saxton, Patented December 17, 1867.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "A." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "A." Received Aug. 19, 1913. F. D. Monckton, Clerk.



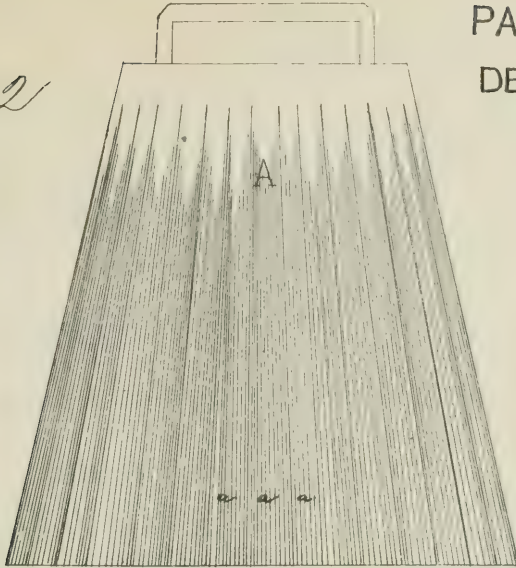
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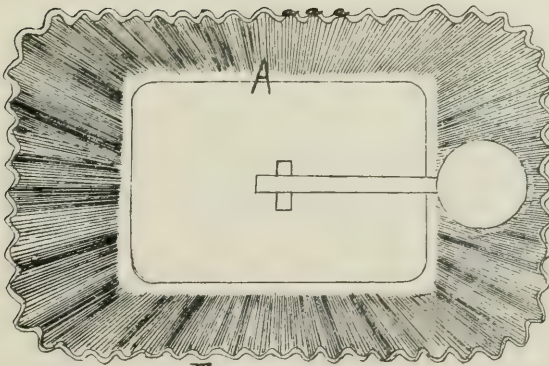
DEC 17 1867

*No. 72,422*

72422



*Figure.1*



*Figure.2*

*Witnesses*

*E. C. White*

*J. L. des Granges*

*Inventor*

*E. S. Gayton*

*By his Atty.*

*W. Randolph*





# United States Patent Office.

GEORGE S. SAXTON, OF ST. LOUIS, MISSOURI.

*Letters Patent No. 72,422, dated December 17, 1867.*

## IMPROVEMENT IN MANUFACTURE OF CORRUGATED BELLS.

*The Schedule referred to in these Letters Patent and making part of the same.*

### TO ALL WHOM IT MAY CONCERN:

Be it known that I, GEORGE S. SAXTON, of the city and county of St. Louis, and State of Missouri, have invented a new and useful Improvement in Bells; and I do hereby declare that the following is a full and clear description thereof, reference being had to the accompanying drawings, and to the letters of reference marked thereon.

This invention relates to an improvement in bells by corrugating the lower portion of their sides or bodies; the object of which improvement is twofold in its nature: Firstly, it is for the purpose of increasing the tintinnabulary quality of the bell, and the volume of the sound issued therefrom; and, secondly, it is for the purpose of constructing small bells of sheet metal, and of one single piece, the corrugations of the sides of the bell taking up the excess of the metal toward the base, and thus rendering it possible to form a perfect pressed bell of one single piece.

To enable those skilled in the art to make and use my improved bell, I will proceed to describe its construction and operation.

Figure 1 of the drawings is a side elevation of one of the improved bells.

Figure 2 is a bottom plan of the same:

The general form of the bell A may be in any pattern that is best adapted to the purposes for which it is intended. The only feature in which it differs from all other bells is in the corrugations *a*, which commence in large folds near or at the bottom of the bell, and, as they rise, gradually diminish toward the top, at which place they entirely vanish. These folds or corrugations *a* increase the lower or vibratory portion of the bell to such an extent as to very perceptibly increase the volume of sound produced by its agitation. The chief object of the improvement, however, is to form the bell in such a manner that it may be constructed by pressing, with suitable dies, a single sheet of metal into the proper form. This of course is confined to small bells, and the result is to produce a better bell at a cheaper price. The depth of the bell of course precludes the idea of pressing a bell into the proper form without taking up the excess of metal in this manner.

Having described my invention, I claim as a new article of manufacture—

The bell A, when it is formed in corrugations, substantially in the manner and for the purpose set forth.

GEO. S. SAXTON.

Witnesses:

M. RANDOLPH,  
T. E. WHITE.



**Defendant's Exhibit "B"—Letters Patent No. 8824,  
to Frederick S. Shirley, Patented December 7,  
1875.**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor.  
Dist. of Cal. Dfts. Exhibit "B." Oct. 2, '12. M.,  
Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the  
Ninth Circuit. Defendant's Exhibit "B." Re-  
ceived Aug. 19, 1913. F. D. Monekton, Clerk.

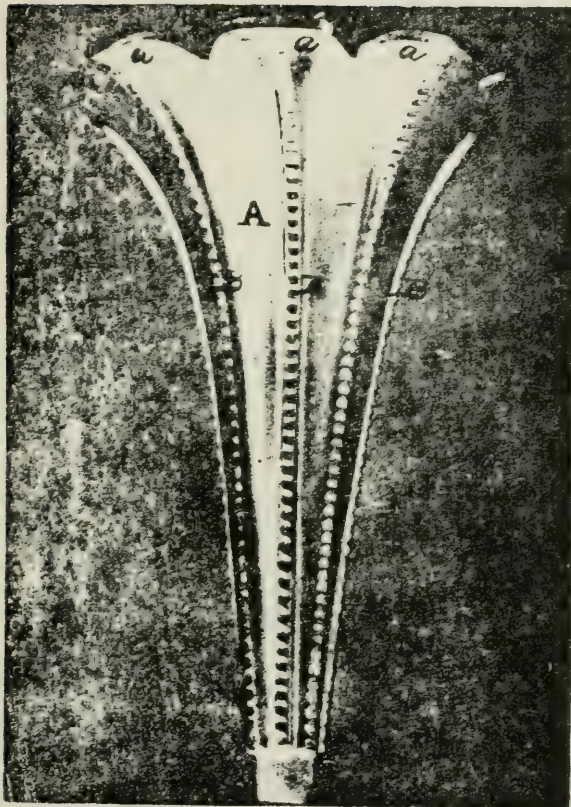


F. S. SHIRLEY.

GLASSWARE.

No. 8,824.

Patented Dec. 7, 1875.



Witnesses:  
*Fred Bond*  
*B. S. Clark*

Inventor:  
*Frederick S. Shirley*  
 By *McClintock*  
*his attys.*





# UNITED STATES PATENT OFFICE.

FREDERICK S. SHIRLEY, OF NEW BEDFORD, MASSACHUSETTS.

## DESIGN FOR GLASSWARE.

Specification forming part of Design No. 8,824, dated December 7, 1875; application filed November 24, 1875.

[Term of Patent  $3\frac{1}{2}$  years.]

### *To all whom it may concern:*

Be it known that I, FREDERICK S. SHIRLEY, of New Bedford, Bristol county, in the State of Massachusetts, have invented a Design for Glass-Vase Bodies, of which the following is a specification:

The nature of my design is fully shown in the accompanying photographic illustration, to which reference is made.

A is the glass-vase body, made of an elongated bell shape, or like a flaring cone, and finished at its mouth or upper edge with flaring curved lips or scallops, as shown at *a*. The exterior surface of this vase-body is ground off to produce a lusterless appearance. B B are ribs, which extend from the line of the base up along the exterior surface of the vase body to the upper edge or mouth, terminating there, one at the center of each of the flaring lips or scallops. These ribs are nicked or serrated throughout their entire length, and are highly polished.

This glass-vase body is intended to be mounted on a standard or base of metal or other material.

I prefer to use clear or colorless glass for the body, but either the surface of the vase or the ribs, or both, may be colored; but I do not consider the coloring to be an essential element in my design.

I am aware that glass vases having a bell or cone shape, and with flaring scalloped lips and longitudinal ribs, are not new, and I do not claim them. The distinctive character of my design is found in serrated and highly-polished ribs extending the length of the vase-body, the surface of which is ground off or lusterless.

What I claim as my invention is—

The design for a glass-vase body, in which serrated and highly-polished ribs extend longitudinally along the ground or lusterless surface of the body, substantially in the manner described.

FREDERICK S. SHIRLEY.

Witnesses:

WENDELL H. COBB,  
GEORGE F. TUCKER.



[Defendant's Exhibit "C"—Letters Patent No. 693,460, to S. Takaba, Patented February 18, 1902.]

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "C." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "C." Received Aug. 19, 1913. F. D. Monckton, Clerk.





S. TAKABA.  
LAMP SHADE.

(Application filed June 24, 1901.)

(No Model.)

Fig. 1.

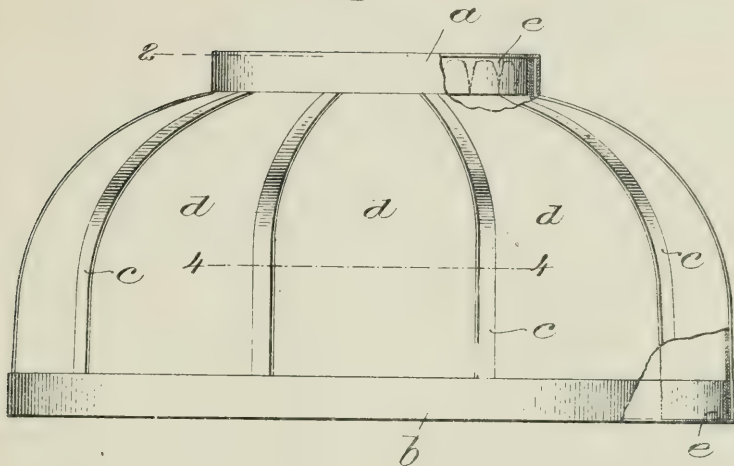


Fig. 3.

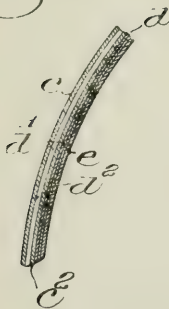


Fig. 2.

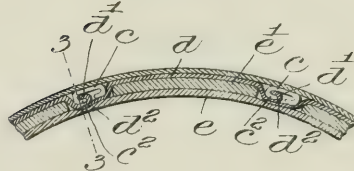
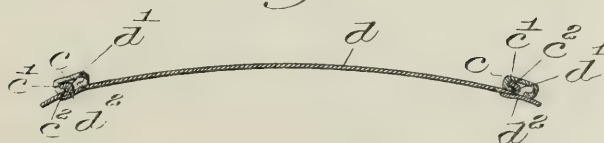


Fig. 4.



Witnesses:  
Fred S. Grunke  
Adolph H. Hain

Inventor,  
Shiro Takaba,  
by Crosby & Gregory  
attys



SHIRO TAKABA, OF BOSTON, MASSACHUSETTS.

## LAMP-SHADE.

SPECIFICATION forming part of Letters Patent No. 693,460, dated February 18, 1902.

Application filed June 24, 1901. Serial No. 65,785. (No model.)

*To all whom it may concern:*

Be it known that I, SHIRO TAKABA, a subject of the Emperor of Japan, residing at Boston, county of Suffolk, State of Massachusetts, have invented an Improvement in Lamp-Shades, of which the following description, in connection with the accompanying drawings, is a specification, like letters on the drawings representing like parts.

My invention is an improvement in lamp-shades of the kind called "Japanese" lamp-shades, in which a light frame is provided with panels or sections of ornamental material, usually of a translucent nature, commonly paper, which is hand-painted or otherwise decorated. Shades of this character have commonly been composed heretofore of a light wooden frame, to which the paper panels have been pasted. Such frames, however, are easily injured and rapidly deteriorate under the influence of the extreme heat from the lamp, so that they become brittle and easily broken, and also it is difficult to paste the paper panels in place and retain them properly on account of the curvature and materials. Accordingly I have devised the hereinafter-described shade of an exceedingly light and durable character, consisting of a metal frame containing specially-formed ribs, which receive the vertical edges of the panel in interlocked relation in such a manner as to give the shade permanence and stability of shape, while at the same time facilitating its construction and producing a trim and neat appearance.

The constructional details of my invention will be pointed out more fully in the following description, reference being had to the accompanying drawings, in which I have shown a preferred embodiment of the invention, and the latter will be further defined in the appended claims.

In the drawings, Figure 1 represents in side elevation a shade containing my invention, parts thereof being broken out for clearness of illustration. Fig. 2 is an enlarged horizontal sectional view taken on the line 2, Fig. 1. Fig. 3 is a transverse vertical section taken on the line 3 3, Fig. 2. Fig. 4 is an enlarged horizontal section taken on the line 4 4, Fig. 1.

As herein shown, the frame consists of upper and lower rings *a b* and vertical ribs *c*,

properly bent or arched, the whole, when of metal, being soldered or otherwise secured together. These inclose a plurality of panels *d*, although it will be understood that I do not restrict myself in all respects to the details of shape and arrangement shown. The ribs *c* are preferably of metal capable of being rolled inwardly to provide a longitudinal pocket *c'* or overhanging retaining-flange *c''* for receiving and holding the inturned edge *d'* of the adjacent panel.

It is difficult to paste a paper panel to a metal rib, and, as already stated, it is difficult to retain the panel in proper shape and position simply by pasting it or laying it flat against a rib; but by tucking in the edge *d'* of the panel and preferably cementing it in place behind the retaining rib or flange *c''* of the rib, as shown, the panel is secured properly in place and the operation is performed with a despatch and neatness not practicable in the old construction referred to.

Having secured one edge of the panel, as shown in Fig. 4, the adjacent longitudinal edge *d''* of the next panel is preferably lapped over and cemented or otherwise secured to the edge *d'*, which has thus been inserted and cemented in place, as shown clearly in Figs. 2 and 4, paper supporting paper readily. In this manner the succeeding joints between the edges of the panels are made until the whole shade is completed, the resulting construction being exceedingly strong, neat in appearance, definite and certain in shape and position, and with no possibility of separation of the panels from the ribs or frame. At their ends the panels and ribs are clamped between bands *e* and the rings, said bands being preferably of some suitable pliable material, pasteboard answering for this purpose in some instances, retaining-pieces *e'* being preferably interposed, and the whole held in place by any suitable means, some kind of cement being usually sufficient.

The frame being of metal is exceedingly durable, maintaining its vigor and strength notwithstanding the heat to which it is subjected by the lamp, whereas the kind having wooden frames gradually became brittle.

The shade is not only strong, but rigid and very light.

It will be understood that while I prefer to

construct the shade precisely as shown, yet I do not limit myself thereto, as many changes may be resorted to within the spirit and scope of my invention, as will be more evident upon  
5 reference to the claims.

Having described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. A lamp-shade, having its shade-surface  
10 composed of ribs and panels, a longitudinal pocket being provided in each rib, a longitudinal edge of an adjacent panel being bent into interlocked engagement with the pocket of the adjacent rib, and means applied to said  
15 longitudinal edge and distinct from said rib for maintaining said panel and rib permanently in their interlocked relation.

2. A lamp-shade, having its shade-surface composed of ribs and panels, said ribs having  
20 longitudinal pockets in their under sides, one longitudinal edge of a panel being bent back

on itself and interlocked with the adjacent rib, and a longitudinal edge of the contiguous panel being secured to the back of the panel thus interlocked.

3. A lamp-shade, having its shade-surface composed of ribs and panels, said ribs having longitudinal pockets in their under sides, one longitudinal edge of a panel being bent back on itself and interlocked with the adjacent  
30 rib, a longitudinal edge of the contiguous panel being secured to the back of the panel thus interlocked, and a ring and band, the upper ends of said panels and ribs being clamped between said ring and band.

35 In testimony whereof have signed my name to this specification in the presence of two subscribing witnesses.

SHIRO TAKABA.

Witnesses:

GEO. H. MAXWELL,  
WILHELMINA C. HEUSER.

[Defendant's Exhibit "D"—Letters Patent No. 10,235, to E. Cairns, Patented September 11, 1877.]

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "D." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "D." Received Aug. 19, 1913. F. D. Monckton, Clerk.





DESIGN.

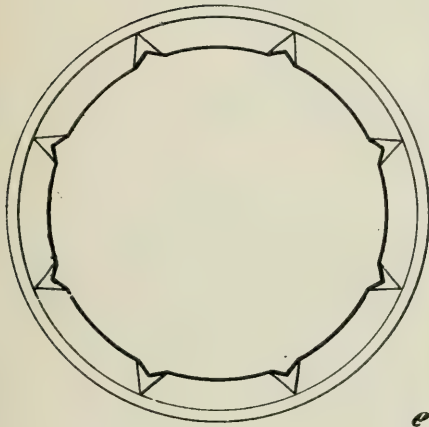
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**E. CAIRNS.**  
**SPEAKING-TRUMPETS.**

No. 10,235.

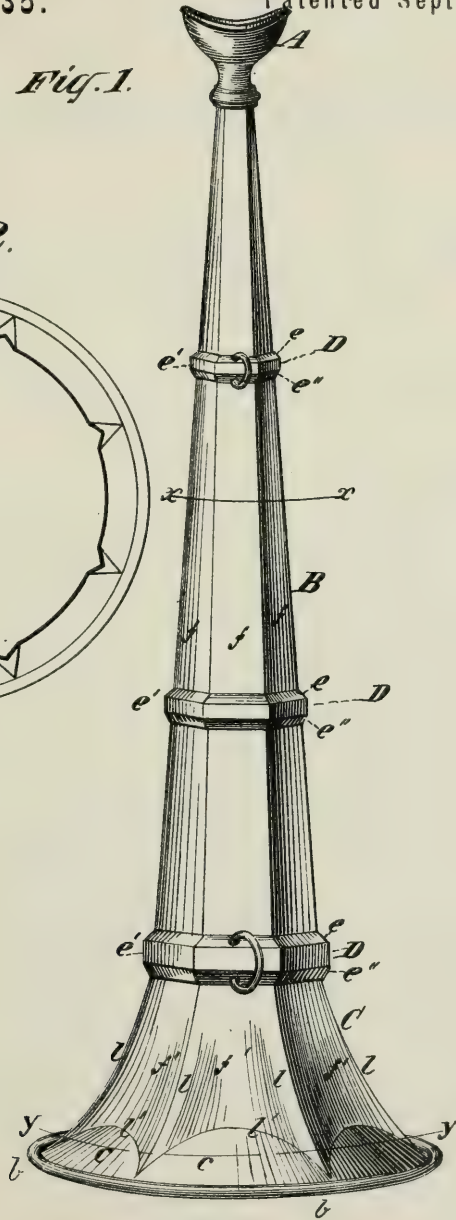
Patented Sept. 11, 1877.

*Fig. 1.*

*Fig. 2.*



*Fig. 3.*



*Witnesses*  
*John Beecher*  
*Edw. Haynes*

*Edward Cairns.*  
*by his Attorneys*  
*Brown & Allen*



# UNITED STATES PATENT OFFICE.

EDWARD CAIRNS, OF MORRISTOWN, NEW JERSEY.

## DESIGN FOR SPEAKING-TRUMPETS.

Specification forming part of Design No. **10,235**, dated September 11, 1877; application filed August 24, 1877.  
[Term of Patent 7 years.]

*To all whom it may concern:*

Be it known that I, EDWARD CAIRNS, of Morristown, in the county of Morris and the State of New Jersey, have originated and designed a Design for Speaking-Trumpets, of which the following is a full, clear, and exact description, reference being had to the accompanying drawing, making part of this specification.

Figure 1 in the drawing represents a perspective view of a speaking-trumpet embodying my design.

A represents the mouth-piece, B the tube, and C the bell, of the trumpet. The tube B has the form of a truncated polygonal pyramid, extending from the bell C to the mouth-piece A, and presents upon its outer surface the equal and geometrically-similar facets *f*, arranged in such manner that a cross-section made in any part of said tube at right angles with its central longitudinal axis will be a regular equilateral polygon, as shown in Fig. 2.

The bell C is, in form, partly pyramidal and partly conical. The flaring polygonal part comprises external curved facets *f'*. Said facets *f'* are extensions of the facets *f*, and their lines of junction *l* extend to and termi-

nate at the bead *b* at the outer margin of said bell. Said facets *f'* are, moreover, slightly concave on their outer surfaces, from which conformation their lines of intersection *l'* with the round flaring part *c c c* of the said bell are marked curves, giving the entire border of the flaring polygonal part where it joins the said round flaring part a scalloped form. A cross-section through the said conical and pyramidal parts of the bell gives the figure shown in Fig. 3. Upon the tube B are formed or attached at intervals polygonal bands D, having three sets of flat facets, *e e' e''*, so arranged that a cross-section of any of said bands made at right angles with any of said facets will give the figure of a trapezoid the not parallel sides of which are equal.

I claim—

The design for a speaking-trumpet consisting of the polygonally-formed tube B, the combined pyramidal and conical bell C, and the faceted bands D, as herein shown and described.

EDWD. CAIRNS.

Witnesses:

FRED. HAYNES,  
BENJAMIN W. HOFFMAN.



**[Defendant's Exhibit "E"—Letters Patent No. 165,912, to W. H. Barnard, Patented July 27, 1875.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "E." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "E." Received Aug. 19, 1913. F. D. Monckton, Clerk.





No. 165,912.

Patented July 27, 1875.

FIG. I.

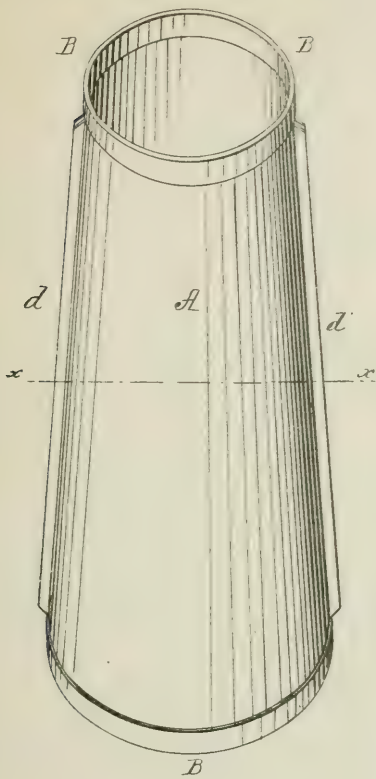


FIG. III.

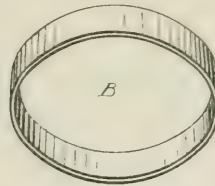


FIG. II.

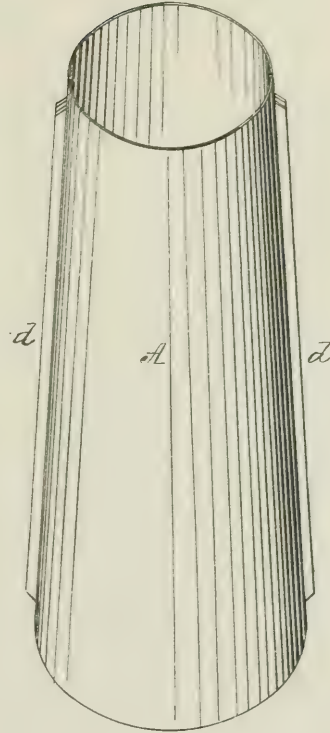


FIG. V.

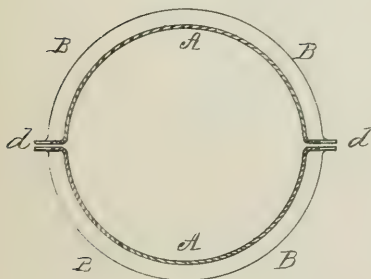
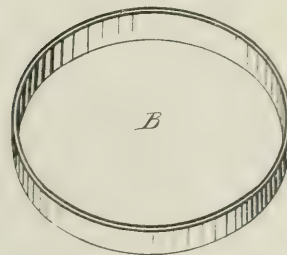


FIG. IV.



WITNESSES:

J. S. Goumby  
W. H. Norris

INVENTOR

William H. Barnard

By James L. Norris.

Atty



# UNITED STATES PATENT OFFICE.

WILLIAM H. BARNARD, OF SEDALIA, MISSOURI.

## IMPROVEMENT IN LAMP-CHIMNEYS.

Specification forming part of Letters Patent No. **165,912**, dated July 27, 1875; application filed January 4, 1875.

*To all whom it may concern:*

Be it known that I, WILLIAM H. BARNARD, of Sedalia, in the county of Pettis and State of Missouri, have invented certain new and useful Improvements in Lamp-Chimneys, of which the following is a specification:

My invention relates to certain improvements in that class of lamp-chimneys which are constructed of two longitudinal sections, united at their edges, and properly bound or clasped together, for the purpose of allowing for the expansion and contraction of the glass when subjected to sudden changes of temperature, and preventing the chimney from cracking or breaking.

The object of my invention is to secure a more perfect joint at the point of union of the two sections, and provide a more secure and reliable device for binding the two sections together, than has been heretofore accomplished in the chimneys of this class, as ordinarily constructed; and my invention consists in constructing a chimney of two longitudinal sections or parts, as usual, each section having a longitudinal flange on its edges, which unite and form a longitudinal projection or edge on the outside of the chimney when the sections are bound together.

By this construction a broad face is obtained along the edges of each section, which form, when properly ground and placed together, a perfect joint.

In the drawings, Figure 1 is a perspective view of my improved lamp-chimney; Fig. 2, a similar view of the same with the end ferrules removed. Figs. 3 and 4 are detached views of the top and bottom ferrules, respectively; and Fig. 5 is a section on line *xx* of Fig. 1.

The letters A A represent the sections composing the chimney. Along the edges of each section, on the outside, a longitudinal flange, *d*, is formed. The faces of these flanges

are accurately ground, so as to form a perfectly tight joint when the sections are joined together. The flanges do not extend quite to the end of the sections, but terminate a short distance from said ends, in order to allow the sections to set into the annular ferrules which bind them together. These annular ferrules are represented by the letters B B. They are constructed so as to grasp the edges of the sections at their ends, both on the inside and outside, and thus firmly bind them together.

It will be seen that by the above-described construction of the sections a broad face will be formed along the edges of the sections at the point of union, which will allow said edges to be readily and accurately ground, forming a perfect joint throughout the entire length of the sections, which it has hitherto been found impossible to obtain.

The annular ferrules, by grasping both the outside and inside of the chimney, will prevent any slipping of the sections, and thus necessarily bind them in place.

The chimneys thus constructed are admirably adapted for packing for transportation, as the sections will nest together, occupying but little room.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

A lamp-chimney constructed of two sections, each of which is provided with laterally-projecting flanges, substantially as described, whereby, when the sections are placed together, a longitudinal projection is formed and a perfect joint secured, as set forth.

In testimony that I claim the foregoing I have hereunto set my hand and seal.

WILLIAM H. BARNARD. [L. S.]

Witnesses:

J. HALL BROWNE,  
J. S. JACKSON.



[Defendant's Exhibit "F"—Letters Patent No. 181,159, to C. W. Fallows, Patented August 15, 1876.]

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "F." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "F." Received Aug. 19, 1913. F. D. Monckton, Clerk.

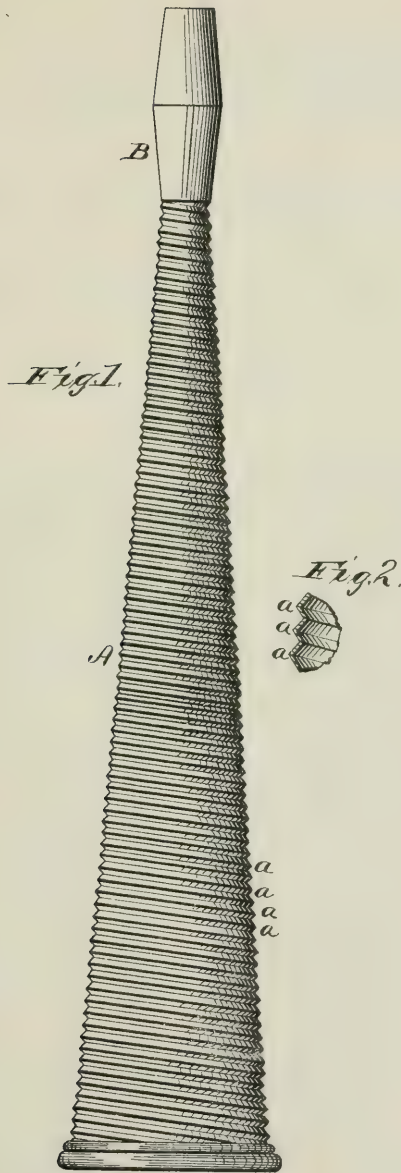




TOY BLOW HORN.

No. 181,159.

Patented Aug. 15, 1876.



WITNESSES

Frank L. Ousland  
C. L. Cook

INVENTOR

Chas W. Fullows  
By Alexander Mason  
Attorneys



# UNITED STATES PATENT OFFICE.

CHARLES W. FALLOWS, OF PHILADELPHIA, PENNSYLVANIA.

## IMPROVEMENT IN TOY BLOW-HORNS.

Specification forming part of Letters Patent No. **181,159**, dated August 15, 1876; application filed June 27, 1876.

*To all whom it may concern:*

Be it known that I, CHARLES W. FALLOWS, of Philadelphia, in the county of Philadelphia, and in the State of Pennsylvania, have invented certain new and useful Improvements in Sheet-Metal Blow-Horns; and do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, and to the letters of reference marked thereon, making a part of this specification.

The nature of my invention consists in the construction of a blow-horn, as hereinafter more fully set forth.

In order to enable others skilled in the art to which my invention appertains to manufacture and use the same, I will now proceed to more fully describe the same, reference being had to the accompanying drawings, forming a part of this specification, in which—

Figure 1 represents a side elevation of my blow-horn, and Fig. 2 represents a small section of the body.

The body A of the horn is made of corrugated sheet metal, in the usual tapering form, and is provided with a mouth-piece, B, having the usual reed. The metal which forms the body is cut in proper shape, and then passed between rollers or dies and crimped or corrugated. These corrugations are preferably

made on an incline, so that when the blank sheet is bent into tubular shape the corrugations *a a* will be on a short spiral, as shown in the drawings.

It is well known that the thinner the metal of which such horns are made the sharper the tone; but in cases where the horns are plain or smooth, and made of light metal, they do not have the requisite strength or keep proper shape, and in a short period would not be merchantable or present a neat appearance.

I claim for my invention that lighter and cheaper metal can be used, and that the same is more easily worked into proper shape by being light, that it costs less in construction, and that the sound made by the mouth-piece and reed is sharper than in the usual blow-horn made of plain or smooth metal.

Having thus fully described my invention, what I claim as new, and desire to secure by Letters Patent, is—

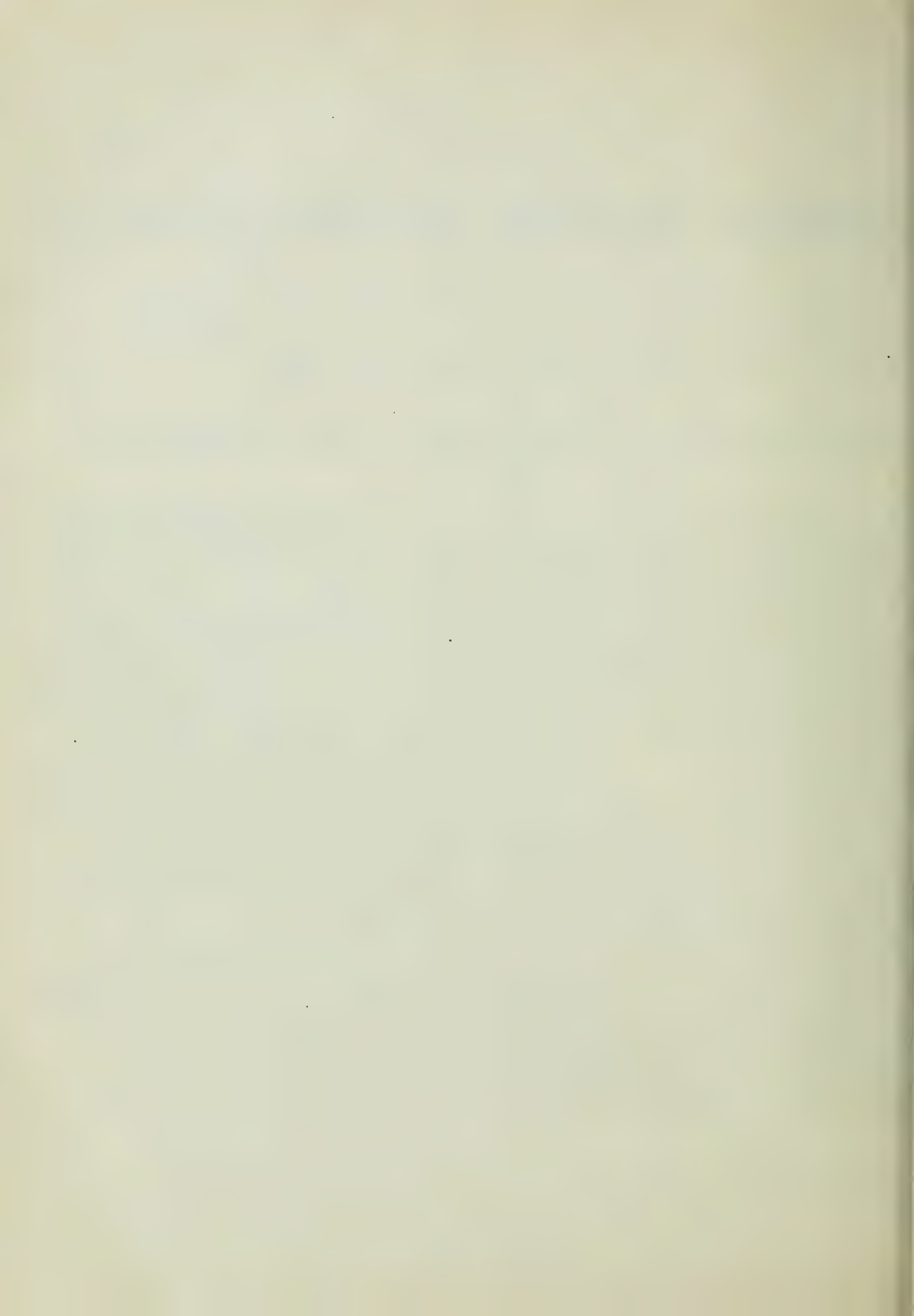
A blow-horn made of corrugated sheet metal, for the purposes herein set forth.

In testimony that I claim the foregoing I have hereunto set my hand this 14th day of June, 1876.

CHARLES W. FALLOWS.

Witnesses:

JAMES FALLOWS,  
ANSON EATON.



**[Defendant's Exhibit "G"—Letters Patent No. 409,196, to C. L. Hart, Patented August 20, 1889.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "G." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "G." Received Aug. 19, 1913. F. D. Monckton, Clerk.





(No Model.)

C. L. HART.  
SHEET METAL PIPE.

No. 409,196.

Patented Aug. 20, 1889.

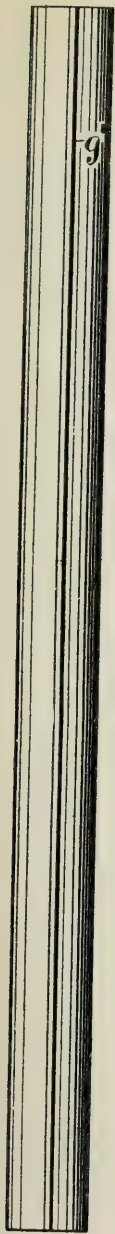


Fig. 1.

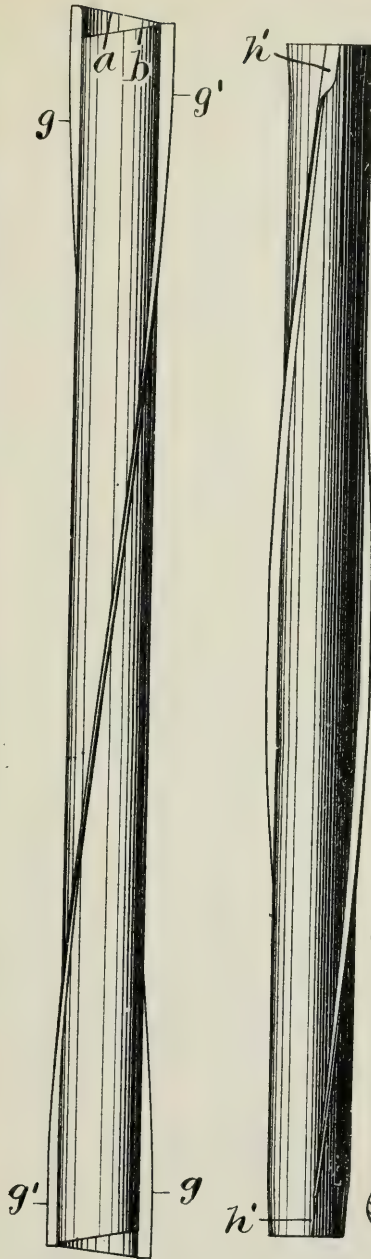


Fig. 2.



Fig. 3.

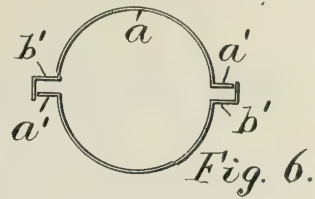


Fig. 6.

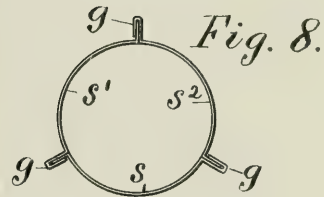


Fig. 8.

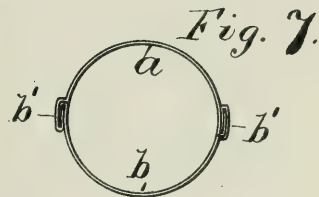


Fig. 7.

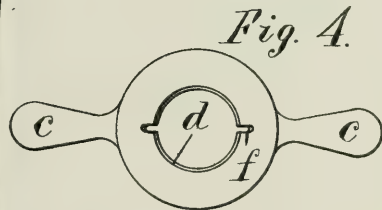


Fig. 4.

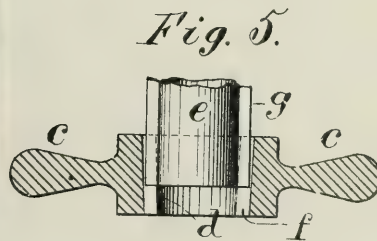


Fig. 5.

Attest:

L. Lee.  
F. C. Fischer.

Inventor.

Charles L. Hart, per  
Crane & Miller, attys.

closed sufficiently to hold the sections together during the twisting operation, and the seams are, after the pipe is twisted, permanently closed to hold the sections in their twisted position.

It will be readily perceived by comparing Figs. 1 and 2 that the spiral seam in Fig. 2 is necessarily longer, upon the same pipe than the straight seam in Fig. 1, and it will therefore be obvious that in the twisting operation one or more of the flanges  $a'$  must slide longitudinally upon certain of the flanges  $b'$  an amount corresponding to the difference in the length of the straight and spiral seams, and that the end of each section will assume an angle with the axis of the pipe, owing to the twisting of each section-blank around such axis. All the seams are not therefore rigidly closed prior to the twisting operation, as such closing would cause a great resistance to such sliding movement of the flanges, but part only of the seams, as the seam  $g'$  in Fig. 2, are closed rigidly before the pipe is twisted to hold the sections firmly in their twisted position.

It will be noticed in Fig. 2 that the ends of the blanks  $a$  and  $b$  coincide upon the closed seam  $g'$ , thus forcing the sliding of the flanges to occur upon the seam  $g$ , at the ends of which the displacement is obvious. It will also be understood that the metal in the flanges  $a'$  and  $b'$  is materially changed in form during the twisting operation, and receives a permanent set to such form before and during the final closing of the seams. It is well known that longitudinal blanks bent in the form shown in Fig. 6 are in practice, when formed, more or less warped or buckled, so that the flanges  $a'$  and  $b'$  upon the opposite edges of the section  $a$  or  $b$  would not lie in the same flat plane. The seaming of the sections together brings the flanges  $a'$  and  $b'$  into contact without materially affecting the tendency of the sections to warp or buckle, and a perfectly straight pipe is not therefore produced by the mere joining of the seams. I have, however, discovered that the twisting operation serves to remove all the buckle from the pipe and to make it exceedingly straight, while the "set" imparted to the respective sections and the seams formed upon their edges serve to hold the pipe permanently in such straight condition. By retaining the seams in a radial position upon the finished pipe at the close of the final seaming operation, as shown in Figs. 2, 3, and 8, the standing seam greatly re-enforces the pipe in every direction and imparts to it an unusual degree of strength and rigidity.

It will be understood by reference to Fig. 1 that the edges of the sections  $a$  and  $b$  in the untwisted pipe are parallel with the axis of the cylinder or pipe which they form, the curvature of the metal being transverse at the edges to such axis, while an inspection of Fig. 3 will show that the twisting operation entirely changes the cylindrical curva-

ture of the metal, so that the line of the curvature is not parallel with the edges of the sections, but at an angle thereto equal to the arc through which the pipe is twisted.

The spiral seam formed upon the pipe in my invention is a much longer and more gradual spiral than could be formed by spirally winding a single blank and securing its overlapped edges, and my construction is readily distinguished from any pipe having a single spiral seam instead of two or more, as in my invention.

The blanks for the sections may be formed with oblique ends, so that when the pipe is twisted its ends will be at right angles to its axis. When the standing seam is used, the pipe-lengths may be readily fitted together by flattening down or removing a portion of the seam at each end and fitting the ends to enter one into the other, as is common with sheet-metal pipes, and shown upon the pipe in Fig. 3 at  $h$  and  $h'$ .

It is immaterial how the pipes are twisted after seaming or how the seams are finally locked to hold the sections in their twisted position, and no means for locking the seams is therefore shown herein.

Having thus set forth my invention, what I claim is—

1. As a new article of manufacture, a sheet-metal pipe formed in two or more longitudinal sections and having twisted seams at the joints of the sections, substantially as herein set forth.

2. As a new article of manufacture, sheet-metal pipes in uniform lengths formed in two or more longitudinal sections and having twisted seams at the joints of the sections, substantially as herein set forth.

3. As a new article of manufacture, a sheet-metal pipe formed in two or more longitudinal sections and having twisted standing seams at the joints of the sections, substantially as herein set forth.

4. As a new article of manufacture, a sheet-metal pipe formed in two or more longitudinal sections and having twisted standing seams at the joints of the sections, with the projection of the seam removed at the ends of the pipe and the ends longitudinally flared and tapered to join the same in series, substantially as herein set forth.

5. As a new article of manufacture, a sheet-metal pipe formed in two or more longitudinal sections united by longitudinal standing seams and having the sections and seams twisted and held in a twisted condition by the locking of the seams, as and for the purpose set forth.

In testimony whereof I have hereunto set my hand in the presence of two subscribing witnesses.

CHARLES L. HART.

Witnesses:

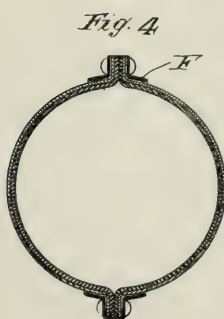
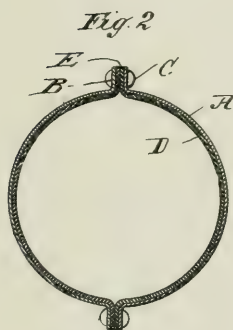
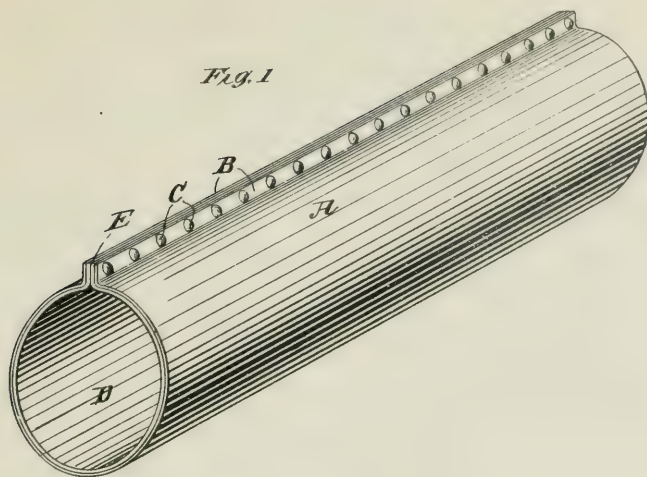
ANSON O. KITFREDGE,  
HENRY COLWELL.

**[Defendant's Exhibit "H"—Letters Patent No. 406,332, to J. C. Bayles, Patented July 2, 1889.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "H." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "H." Received Aug. 19, 1913. F. D. Monckton, Clerk.





Witnesses:

*Raphael Netter*  
*Robt. F. Gaylord*

*Jas. C. Bayles* *Inventor*  
*by*  
*Duncan Curtis & Page*  
*Attorneys.*







JAMES C. BAYLES, OF NEW YORK, N. Y.

## PIPE OR TUBE.

SPECIFICATION forming part of Letters Patent No. 406,332, dated July 2, 1839.

Application filed April 6, 1839. Serial No. 306,167. (No model.)

*To all whom it may concern:*

Be it known that I, JAMES C. BAYLES, of the city, county, and State of New York, have invented certain new and useful Improvements in Pipes or Tubes, of which the following is a full, clear, and exact description, reference being had to the accompanying drawings.

The present invention relates to the construction of pipes or tubes, and especially to that class of pipes that are adapted to conducting acidulous or other iron-destroying liquids. Thus in mining and similar operations it is found that much of the water that it is necessary to drain or draw off is more or less impregnated with sulphur or other elements that render it corrosive in its action upon metal pipes which usually are made of iron.

Heretofore it has been customary to a limited extent to use pipes made of wood or similarly non-corrosive material; but this kind of pipe is obviously impracticable in various respects. It is difficult to make, as well as expensive, especially in large sizes and in regions where there is little timber. It is cumbersome to handle and does not well serve where a water-tight pipe is needed.

It is therefore the object of the invention to produce a metal pipe which shall be capable of resisting the action of the iron-destroying fluids; and the invention consists of a pipe made up from sheet-iron and provided with a lining or sheathing of lead.

Referring to the drawings, Figure 1 shows a section of pipe embodying the invention and having but one seam. Figs. 2 to 5 are cross-sections of modified forms.

Referring to these views in detail, A represents the exterior or body part of the pipe. This body is composed of sheet-metal blanks, which is brought into cylindrical form by any suitable means, with outwardly-projecting flanges B along its longitudinal edges. These flanges are brought opposite each other and then secured together by the rivets C, or any other suitable form of connection—that is to say, bolts or screws may be used, or even any form of suitable clamp—and in the case of very thin metal the flanges may be made to clasp each other or lock together.

D is a lining of lead, which extends over

the entire inner surface of the metal body A. This lead lining will usually be of a thin gage, and before the seam parts of the iron body of the pipe are closed finally together the sheet of lead will be inserted in such body and worked down to conform to substantially the same form—that is, so as to lie closely on the inner surface of the sheet-iron. Of course the sheet-lead may be shaped with the body of the pipe when this is practicable, and still other ways of placing the lining within the body of the pipe and conforming it thereto will occur to those familiar with the art of pipe-making. This lead sheathing is to be flanged similarly to the blank of the body part, and the flanges E thus formed are to be brought together face to face and secured to and between the flanges B of the iron body. Thus the seam of the pipe as a whole consists of four thicknesses and forms a rib or wing extending outwardly from the surface of the pipe, which serves to stiffen and strengthen the pipe and exposes the junctional parts of the seam for easy manipulation in case of repair of leaks or ruptures.

It is essential in the construction of this pipe that the interior sheathing be secured between the flanges of the iron body. Not only is a tight seam readily formed, but the lining is held against collapsing or being forced away from the surface of the iron. Thus, as is well understood, the lead lining under the action of heat will expand and stretch, but it will not when subsequently cooled contract and return to its previous form, and the effects of long-continued expansion and contraction of the iron body of the pipe will tend to corrugate the lining and to force it away from contact with the inner face of the pipe, as well as to rupture it or cause it to collapse; but when the lining is attached to the body of the pipe the distortion of the lead lining is practically obviated, for the lining will be held against moving away from the iron. Where pipe of but a single seam is used, the pipe should be laid with the seam uppermost, so that the lining will be positively held up by the iron body, and not alone by virtue of the strength of its own arch, for then the action of contraction and expansion, which would be most exerted in the arch, will have no serious or detrimental effect.

Fig. 2 shows a form of pipe having two seams, but in other respects it is the same as the pipe of Fig. 1. Fig. 3 is another similar form of pipe composed of three sections and having three seams.

It is expected that the most available form of pipe would be one having two or more seams, as the sections of such a pipe may be most conveniently bunched and shipped from the factory to the place of use, where the sections may be secured together in pipe form. So, too, with such pipe, the separate sections are so nearly flat that it is a simple matter to apply the lead linings to them, which may very readily be done at the time of assembling them into pipe form. The lead in thin sheets would have but to be laid in the sections and could be quickly shaped thereto by mallets or other simple hand-tools, and in case the run of water does not fill the pipe, or does so rarely, then only the lower or underneath section or sections need be lined.

In Fig. 4 I show the seams provided with re-enforce pieces F, which are angle-bars lying in the angles of the seams, and are employed where a strong pipe is needed and the rigidity and strength of the seam parts is a matter of importance. These re-enforce bars may be of any other suitable form, or they may be of a single piece instead of separate strips located upon opposite sides of the seam and adapted to inclose the seam parts.

Fig. 5 shows one form of flat-sided pipe, this particular form being square and having a seam along the middle line of its two opposite sides.

The invention may be embodied in yet other forms of pipe; but it is believed those shown serve to illustrate the principle of the invention and its application.

Although I have described this pipe as applied to the drainage of mines and similar works, it will be obvious that its utility is not limited thereto, and that it is applicable to the conduction of any kind of liquids and under any circumstances where such pipe would be effective.

What I claim as new is—

1. A pipe composed of a sheet-iron section shaped into cylindrical form with outwardly-projecting flanges along its opposite longitudinal edges, and a sheet-lead section similarly shaped and arranged within the sheet-iron section, with its flanges brought together face to face and secured to and between the flanges of the iron section.

2. A pipe composed of two or more sheet-iron sections, each shaped into the partial form of the pipe, with outwardly-projecting flanges at their longitudinal edges and provided with a sheet-lead lining; the sections being arranged in pipe form and their flanges secured together.

3. A pipe composed of sections of sheet-iron shaped longitudinally into pipe form and secured together along their longitudinal edges, and having a sheet-lead lining which is secured to the iron sections at their seams.

JAMES C. BAYLES.

Witnesses:

FRANK E. HARTLEY,  
ERNEST HOPKINSON.

**[Defendant's Exhibit "I"—Letters Patent No. 34,907, to C. McVeety and J. F. Ford, Patented August 6, 1901.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "I." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "I." Received Aug. 19, 1913. F. D. Monekton, Clerk.



C. McVEETY & J. F. FORD.

SHIP'S VENTILATOR.

(Application filed July 10, 1901.)

FIG. 1.

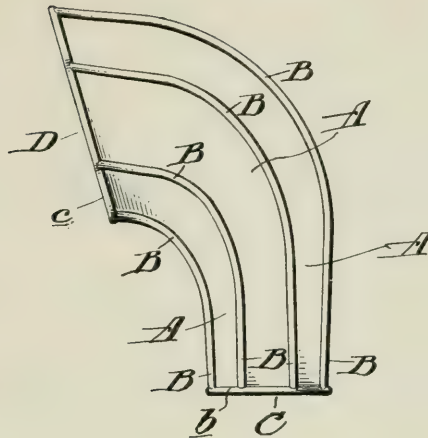


FIG. 2.

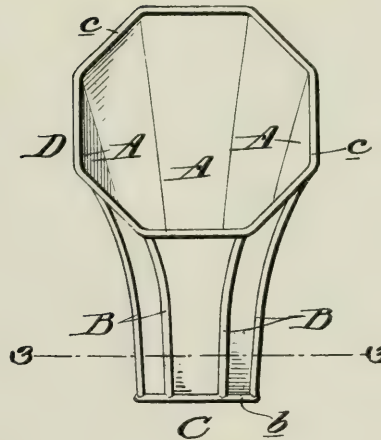
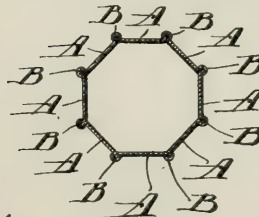


FIG. 3.



WITNESSES:

Coroman S. Sterling  
Richard H. Sharp

INVENTORS:

Charles McVeety  
John F. Ford  
By their attorney  
Walter W. Calmore







# UNITED STATES PATENT OFFICE.

CHARLES McVEETY AND JOHN F. FORD, OF PHILADELPHIA, PENNSYLVANIA.

## DESIGN FOR A SHIP'S VENTILATOR.

SPECIFICATION forming part of Design No. 34,907, dated August 6, 1901.

Application filed July 10, 1901. Serial No. 67,794. Term of patent 14 years.

### *To all whom it may concern:*

Be it known that we, CHARLES McVEETY and JOHN F. FORD, citizens of the United States, residing at Philadelphia, in the county of Philadelphia and State of Pennsylvania, have invented and produced a new and original Design for Ships' Ventilators, of which the following is a specification.

Referring to the accompanying drawings, forming part of this specification, Figure 1 illustrates a side elevation of a ventilator, showing our new design. Fig. 2 represents a front elevation of the same, and Fig. 3 shows a horizontal section taken on line 3 3 of Fig. 2.

As shown in the drawings, the leading or material feature of our design consist of a series of plates A flat in cross-section, as shown in Fig. 3. The plates have arranged at the point of junction ribs B, and at the base C and mouth D are arranged ribs b and c, which intersect the ribs B.

The general contour of the ventilator is that of a curved tapering figure in the form of a cornucopia, being octagonal in cross-section and having convex ribs at the base and mouth, and similar ribs at the intersection of the plates, forming the walls of the ventilator.

Having described our invention, what we claim as new, and desire to secure by Letters Patent, is—

The design for a ventilator substantially as herein shown and described.

In testimony whereof we affix our signatures in presence of two witnesses.

CHARLES McVEETY.  
JOHN F. FORD.

Witnesses:

D. P. S. GARWOOD,  
H. E. COUGHLIN.



[Defendant's Exhibit "J"—Letters Patent No. 612,639, to J. Clayton, Patented October 18, 1898.]

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "J." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "J." Received Aug. 19, 1913. F. D. Monekton, Clerk.



No. 612,639.

Patented Oct. 18, 1898.

J. CLAYTON.  
AUDIPHONE.

(Application filed Dec. 8, 1896.)

(No Model.)

Fig. 1.

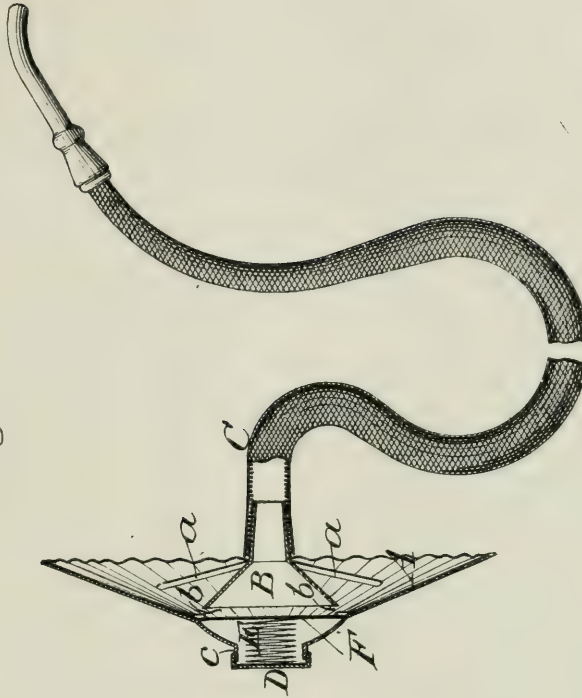
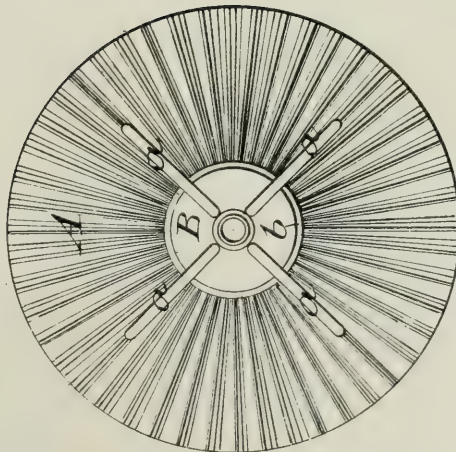


Fig. 2.



Witnesses:-  
George Barry Jr.  
Edward (Vener)

Inventor:-  
James Clayton  
by attorneys  
Brown & Howard





# UNITED STATES PATENT OFFICE.

JAMES CLAYTON, OF NEW YORK, N. Y.

## AUDIPHONE.

**SPECIFICATION** forming part of Letters Patent No. 612,639, dated October 18, 1898.

Application filed December 8, 1896. Serial No. 614,868. (No model.)

*To all whom it may concern:*

Be it known that I, JAMES CLAYTON, of the city of New York, (Brooklyn,) in the county of Kings and State of New York, have invented a new and useful Improvement in Audiphones, of which the following is a specification.

I will first describe my invention with reference to the accompanying drawings and afterward point out its novelty in the claims.

Figure 1 in the accompanying drawings represents a central sectional view of one example of an audiphone embodying my invention and provided with a flexible ear-tube. Fig. 2 is a face view of the same with the flexible ear-tube omitted.

A is a conical disk, opposite to the concave face of which is concentrically arranged the trumpet-mouth B of a sound-conducting tube C, represented as a flexible ear-tube, the said trumpet-mouth having its concavity in the opposite direction to that of the disk and being so affixed to the disk, as by radial arms *a a*, that an annular opening *b* is left between the edges of said mouth and the face of the disk. In front of the central portion of the disk opposite the trumpet-mouth there is distended a diaphragm F of suitable material, as very thin steel, the edges of the said diaphragm being united with the disk A, so that the annular opening *b*, before mentioned, is also between the diaphragm and the trumpet-mouth.

The portion of the disk A which surrounds the trumpet-mouth B is, in the example of the invention represented by the drawings, corrugated in radial lines from the diaphragm to its own circumference. The said disk has a central opening, around which is a socket *c*, and to this socket is fitted a cap D. Between this cap and the back of the diaphragm is placed a light coil-spring E, which is made to press with more or less force on the diaphragm, according as the cap is adjusted on the socket toward or from the diaphragm.

The operation is as follows: The instrument is held by the listener with the concave face of the disk A toward the speaker or

source of sound, and the end of the ear-tube is placed in his ear. The sound-waves striking the disk are gathered therein toward the center thereof and are thereby directed over the diaphragm and into the trumpet-mouth of the conducting or ear tube, the vibrations of the diaphragm greatly assisting in the sound transmission. The adjustment of the cap D and the adjustment of the pressure of the spring upon the diaphragm thereby produced give the diaphragm greater or less tension and a more or less active vibration, which can be regulated as may be found desirable by the person using the instrument.

It has been found by careful and repeated experiments in the use of an instrument of this kind that as compared with a smooth conical disk the radially-corrugated disk is very much more effective.

What I claim as my invention is—

1. In an audiphone, the combination of a conical disk, a flexible diaphragm distended in front of the central portion of the concave face of and having its edges attached to said disk, and an ear-tube having a trumpet-mouth which is attached concentrically to said disk with its concavity in the opposite direction to the concavity of the disk and with an annular opening between its edges and the disk and diaphragm, substantially as herein described.

2. In an audiphone, the combination of a conical disk having a central opening, a flexible diaphragm distended in front of the concave face of and having its edges attached to said disk, an adjustable cap fitted to the central opening of the said disk behind the diaphragm, a spring located between the said cap and diaphragm for varying the tension of the diaphragm as the cap is adjusted, and an ear-tube having a trumpet-mouth attached to the said disk at the concave face thereof opposite to and spaced from the diaphragm, substantially as herein described.

JAMES CLAYTON.

Witnesses:

FREDK. HAYNES,  
LIDA M. EGBERT.





**[Defendant's Exhibit "K"—Letters Patent No. 651,368, to J. Lanz, Patented June 12, 1900.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "K." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "K." Received Aug. 19, 1913. F. D. Monckton, Clerk.



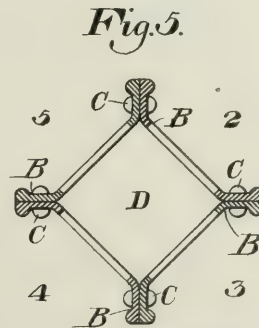
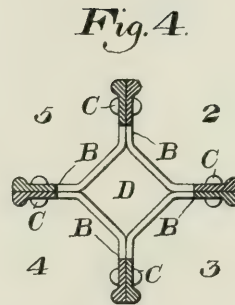
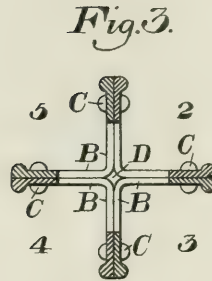
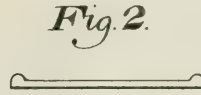
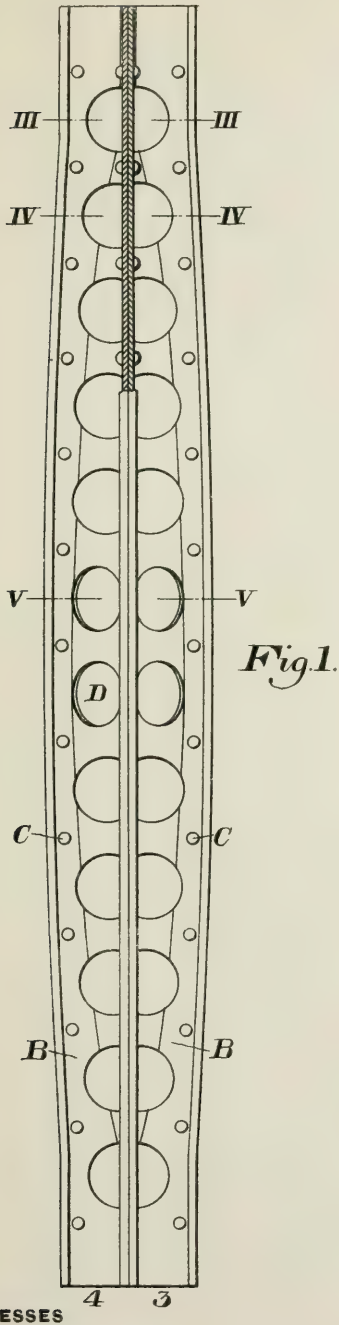
J. LANZ.

COMPOSITE METAL BEAM OR COLUMN.

(Application filed Jan. 12, 1900.)

(No Model.)

2 Sheets—Sheet 1.



WITNESSES

Warren W. Swartz  
H. M. Corwin

INVENTOR

John Lanz  
by Bassett & Bassett  
his Attorneys.



J. LANZ.

COMPOSITE METAL BEAM OR COLUMN.

(Application filed Jan. 12, 1900.)

(No Model.)

2 Sheets—Sheet 2.

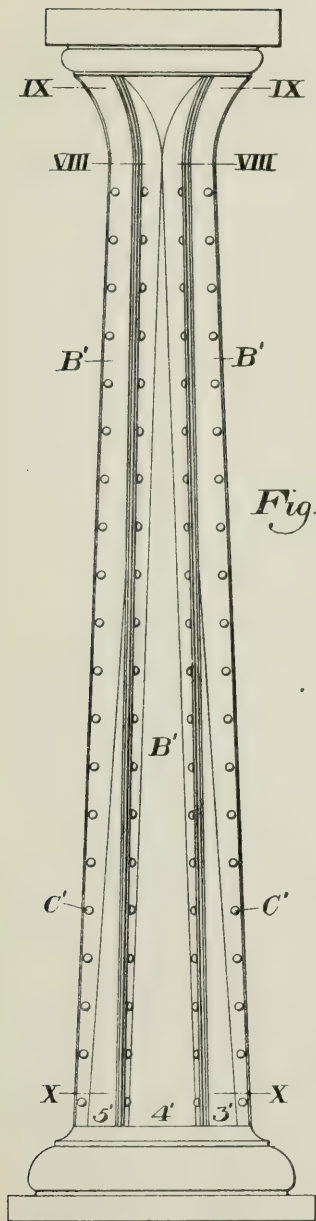


Fig. 6.

Fig. 7.

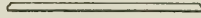


Fig. 8.

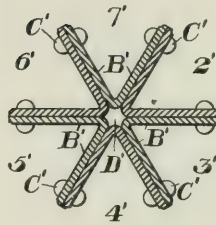


Fig. 9.

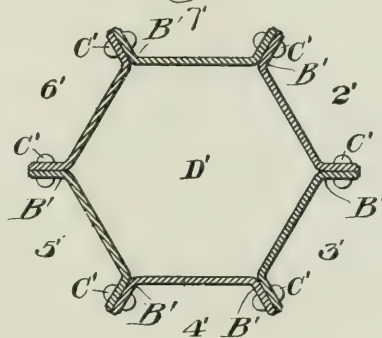
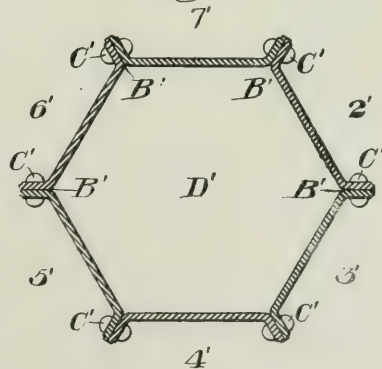


Fig. 10.



WITNESSES

Warren W. Swartz  
H. M. Corwin

INVENTOR

John Lanz  
by Baxendell & Baxendell  
his Attorneys.





## COMPOSITE METAL BEAM OR COLUMN.

SPECIFICATION forming part of Letters Patent No. 651,368, dated June 12, 1900.

Application filed January 12, 1900. Serial No. 1,204. (No model.)

*To all whom it may concern:*

Be it known that I, JOHN LANZ, of Pittsburg, in the county of Allegheny and State of Pennsylvania, have invented a new and useful Improvement in Composite Metal Beams or Columns, of which the following is a full, clear, and exact description, reference being had to the accompanying drawings, forming part of this specification, in which—

Figure 1 shows in side elevation a composite metal bridge-beam constructed in accordance with my invention. Fig. 2 is an end view of the original form of one of the metal pieces of which the column is composed. Figs. 3, 4, and 5 are cross-sections, on a larger scale, on the lines III III, IV IV, and V V of Fig. 1, respectively. The figures on Sheet 2 show a modified construction. Fig. 6 is a side elevation of a composite column embodying my invention. Fig. 7 is an end view of one of the pieces of the column in its original shape. Figs. 8, 9, and 10 are horizontal cross-sections on the lines VIII VIII, IX IX, and X X, respectively, of Fig. 6, but on a larger scale.

The object of my invention is to provide a composite metal beam, brace, or column for use in bridge construction, buildings, &c., which shall be tapering or of varying diameter at different points of its length.

Referring to Sheet 1 of the drawings, in making my improved beam or column I take a number of metal plates or beams 2, 3, 4, and 5, which may consist either of flanged structural shapes or of unflanged metal plates, and the same being in angle form they are set with their angles in proximity and their flanges B B abutted against each other, preferably in line with radii of the beam or column and riveted together, as at C C, so as to constitute the composite beams shown in Fig. 1. In order to taper such column or beam, its elements 2 3 4 5 are shaped by pressing or otherwise so that the portions of the flanges B B which come in contact and through which the rivets pass vary in width conformably to the taper desired. The consequence is that the interior space D of the column or beam also varies in size, and the greater this space the greater will be the diameter of the composite column or beam. I am therefore enabled from metal pieces or plates of uniform size to make beams or columns having any desired taper or diameter

or variation of dimensions at different points. They may be made tapering from the bottom up, as in Fig. 6, or with a swell at the middle, as in Fig. 1. Indeed it will readily be seen that my improvement affords the greatest facility for shaping the column according to the particular use for which it is intended and for making it highly ornamental in appearance when desired.

In the figures on Sheet 2 of the drawings I show a column made of six metal plates 2' 3' 4' 5' 6' 7', which, as shown in Fig. 7, are originally unflanged, but which are pressed into angular form and are assembled with their flanges B' B' in contact and connected by rivets C' C', as above explained with reference to the figures on Sheet 1. By varying the width of the flanges B' the column is made of tapering form.

Within the scope of my invention as defined in the claims many changes may be made by the skilled mechanic, since

What I claim is—

1. A composite column, brace, or beam, made up of metal pieces of uniform width and angular form, having meeting flanges which are fastened together, said meeting flanges being varied in width at different points to vary the diameter of the column; substantially as described.

2. A composite metal beam or column made up of four pieces, 2, 3, 4, 5, of uniform width and angular form set with their angles in proximity to each other and with their flange portions fastened together, said flange portions being varied in width to impart to the beam or column varying diameters at different points; substantially as described.

3. A composite column, brace or beam made up of metal pieces of uniform width formed with suitable angles, having riveted flanges lying in a radius from the center of the column, said parallel flanges being varied in width to conform to the taper or diameter of the column desired at any point of its length; substantially as described.

In testimony whereof I have hereunto set my hand.

JOHN LANZ.

Witnesses:

H. M. CORWIN,  
GEO. B. BLEMING.



**[Defendant's Exhibit "L"—Letters Patent No. 705,126, to G. Osten and W. P. Spalding, Patented July 22, 1902.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "L." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "L." Received Aug. 19, 1913. F. D. Monckton, Clerk.



## HORN FOR SOUND RECORDING AND REPRODUCING APPARATUS

(Application filed June 27, 1901.)

(No Model.)

Fig. 6.

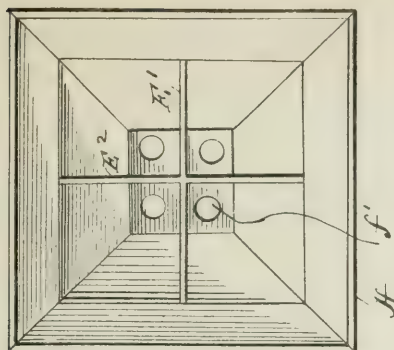


Fig 4.

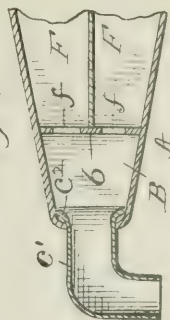


Fig. 5.

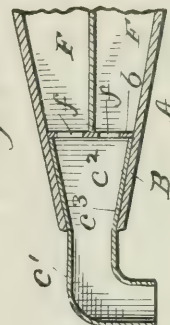


Fig. 3.

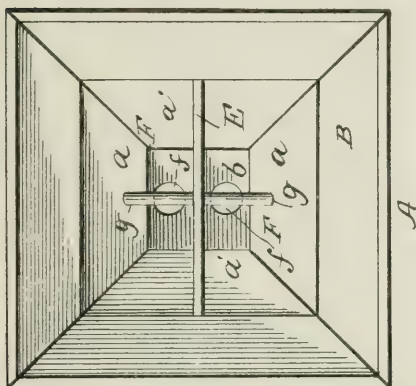
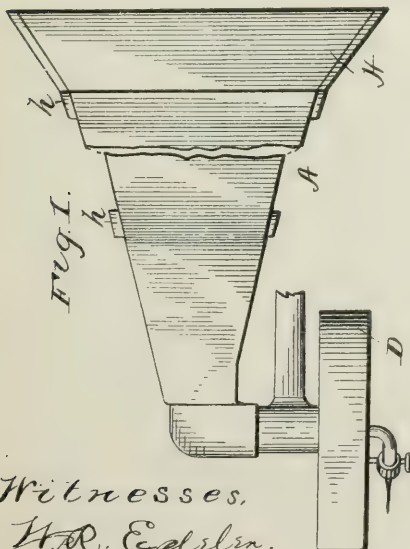
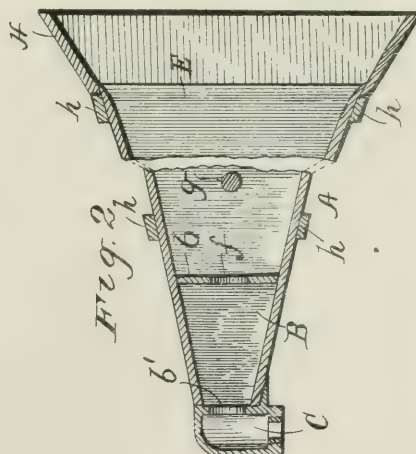


Fig. 1.



Fr 29. 27



Witnesses,

W. R. Erdman,

Geo. F. Evans

*Inventors*

George Osten and  
William V. Spalding  
by Thos. H. H. H. H. atty.

by *Hub. & Hawers* *auth.*





# UNITED STATES PATENT OFFICE.

GEORGE OSTEN AND WILLIAM P. SPALDING, OF DENVER, COLORADO.

## HORN FOR SOUND RECORDING AND REPRODUCING APPARATUS.

SPECIFICATION forming part of Letters Patent No. 705,126, dated July 22, 1902.

Application filed June 27, 1901. Serial No. 66,301. (No model.)

*To all whom it may concern:*

Be it known that we, GEORGE OSTEN and WILLIAM P. SPALDING, residents of Denver, Colorado, have invented a new and useful Improvement in Horns for Sound Recording and Reproducing Apparatus, which invention is fully set forth in the following specification.

Our Patent No. 685,409, dated October 29, 1901, claims a multiple horn consisting of a plurality of small horns all communicating at their smaller ends with one and the same recorder or reproducer and a hood or bell common to all of the small horns and into which said small horns discharge or from which they receive the sounds at their larger ends.

Although the apparatus of our present invention, in its preferred form, includes the features of construction above referred to, as well as the transmitter described in said patent, the present invention is designed more particularly as an improvement upon the patented invention.

We have discovered that a large horn, of any suitable material, partitioned into a plurality of small horns by a partition or partitions, preferably of wood, acting as a sounding-board, gives improved results, and that still better results are obtained by the use of sound-posts in conjunction with the sounding-board partition or partitions. The manner in which we utilize these discoveries will be best understood by reference to the accompanying drawings, illustrating several embodiments of our invention, and wherein—

Figure 1 is a plan view showing a recorder or reproducer connected with the horn. Fig. 2 is a longitudinal sectional view of the horn. Fig. 3 is a view looking into the large end of the horn. Figs. 4 and 5 are views illustrating modifications of the elbow leading to the recorder or reproducer. Fig. 6 is a view looking into the larger end of a modified construction of horn.

A is the body of the horn, which, as shown, is made of four tapering thin wooden sides  $a a a' a'$ , secured together along their edges, thus forming a body part of rectangular cross-section. The body part may, however, be made of circular, oval, or any other suitable shape in cross-section.

B is a distributing chamber or mouth at

the small end of the horn, bounded at one end by a transverse partition or wall  $b$ . At its smaller end mouth B communicates, through an opening  $b'$ , with a throat C, leading through a wooden elbow or short tube  $c$ , which is secured to the small end of the horn. Elbow or short tube  $c$  may be bent, as shown, or straight. At its outer end throat C communicates with a reproducer or recorder D, Fig. 1.

E is a sounding-board extending forward from partition  $b$ , secured at its side edges to the opposite sides  $a' a'$  of body A and longitudinally dividing the interior of the latter into two small horns F F, which communicate with the distributing chamber or mouth B through openings  $ff$  in partition  $b$  on opposite sides of the sounding-board E.

$g g$  are two sound-posts interposed between the sounding-board E and the sides  $a a$ . They communicate vibrations from the sounding-board to the sides of the horn, and vice versa.

$h h$  are outside strips or ribs extending across sides  $a' a'$  in a direction practically parallel to the sound-posts and acting to strengthen the tone and vibrations, as well as making the horn more durable. The sound-posts and ribs are of special importance, as they act in practically the same manner as do the sound-post and ribs of a violin. They improve the tone quality by softening and mellowing the same, at the same time increasing the carrying properties and distinctness of the sounds, particularly where the horn is made completely of wood. The metallic sound so common to sound recording and reproducing apparatus is effectually eliminated.

Any double effect that may otherwise be produced by the sounds coming from the two small horns F F is avoided by the action of the single bell or hood H, into which both of said small horns discharge, said hood causing the sounds coming from the separate small horns to blend together before they are finally discharged from the horn. As shown in the drawings, hood H is also made of wood and secured to the end edges of sides  $a a a' a'$ .

As shown in Fig. 4, the elbow  $c'$  instead of being made of wood, as in Figs. 1 and 2, is made of brass or other suitable metal and has a flared or bell-shaped end  $c^2$  opening into the distributing-chamber B. Fig. 5 illustrates a somewhat-similar arrangement, the flared or

bell-shaped end *c*<sup>3</sup> of the elbow in this casing being of such length as to constitute a lining for the chamber B.

In the form of horn shown in Fig. 6 two sounding-boards *E*<sup>1</sup> *E*<sup>2</sup>, disposed at right angles to each other longitudinally, divide the interior of the horn into four small horns, each communicating with the distributing-chamber, such as shown in Fig. 2, through an opening *f*<sup>1</sup>. As the sounding-boards bear against all of the sides of the horn, no sound-posts are necessary in this arrangement.

What we claim is—

1. In sound recording and reproducing instruments, the combination of a multiple horn comprising a plurality of small horns separated from each other by a sounding-board, with a sound recorder or reproducer in communication with said multiple horn.

2. A multiple horn comprising a plurality of small horns separated from each other by a sounding-board and a common distributing chamber or mouth with which the small horns communicate at their smaller ends.

3. A multiple horn comprising a wooden body part divided interiorly into a plurality of small horns by a wooden sounding-board.

4. A horn comprising a plurality of small horns separated from each other by a sounding-board, a common distributing chamber or mouth with which the small horns communicate at their small ends, and a hood or bell common to all of the small horns and into which said small horns discharge or from which they receive the sounds at their larger ends.

5. A horn comprising a body part adapted to communicate at its small end with a recorder or reproducer, a lateral partition in the body part forming a mouth or distributing-chamber at the smaller end of the horn,

and a longitudinally-extending sounding-board dividing the interior of the body part outside of the mouth into two small horns communicating with the mouth through openings in the lateral partition.

6. A horn comprising a body part adapted to communicate at its small end with a recorder or reproducer, a lateral partition in the body part forming a mouth or distributing-chamber at the smaller end of the horn, a longitudinally-extending sounding-board dividing the interior of the body part outside of the mouth into two small horns communicating with the mouth through openings in the lateral partition, and a hood or bell common to all of the small horns and into which said horns discharge or from which they receive the sound at their larger ends.

7. A horn for use with apparatus for recording and reproducing sounds having a sounding-board longitudinally disposed therein.

8. A horn for use with apparatus for recording and reproducing sounds having a sounding-board longitudinally disposed therein and a sound-post interposed between the sounding-board and side wall of the horn.

9. A wooden horn for use with apparatus for recording and reproducing sounds having a wooden sounding-board longitudinally disposed therein and a sound-post interposed between the sounding-board and side wall of the horn.

In testimony whereof we have signed this specification in the presence of two subscribing witnesses.

GEORGE OSTEN.

WILLIAM P. SPALDING.

Witnesses:

W. A. RICE,

L. GOLDMAN.

**[Defendant's Exhibit "M"—Letters Patent No. 648,994, to M. D. Porter, Patented May 8, 1900.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "M." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "M." Received Aug. 19, 1913. F. D. Monckton, Clerk.





M. D. PORTER.  
COLLAPSIBLE ACOUSTIC HORN

(Application filed July 31, 1899.)

(No Model.)

2 Sheets—Sheet 1.

Fig. 1

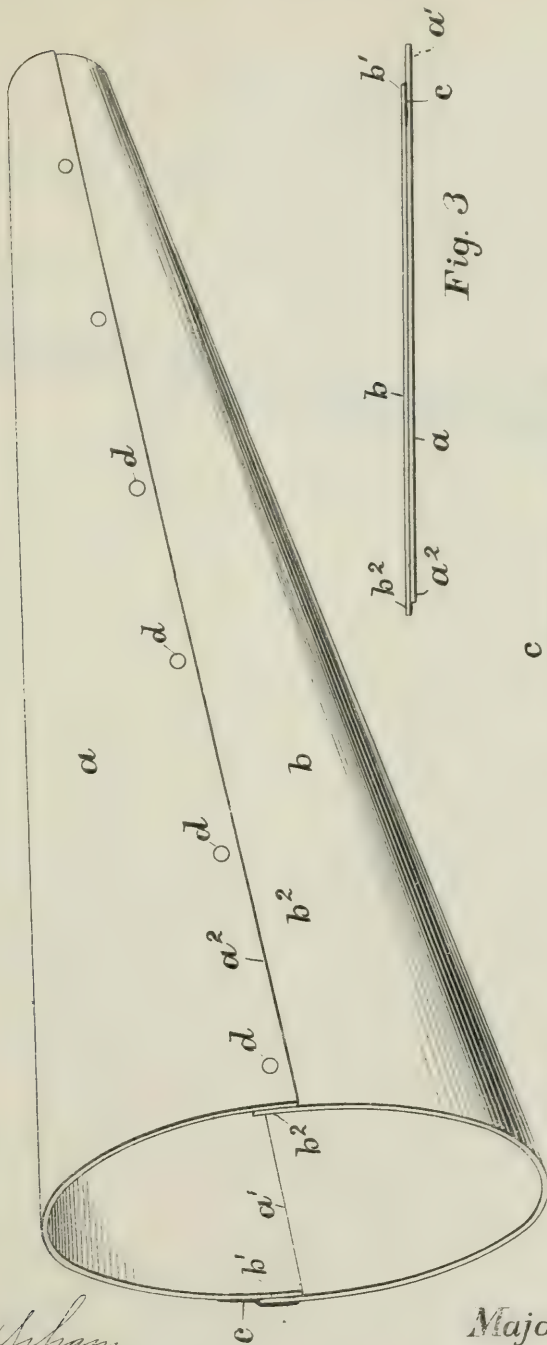


Fig. 3

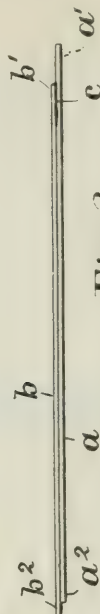
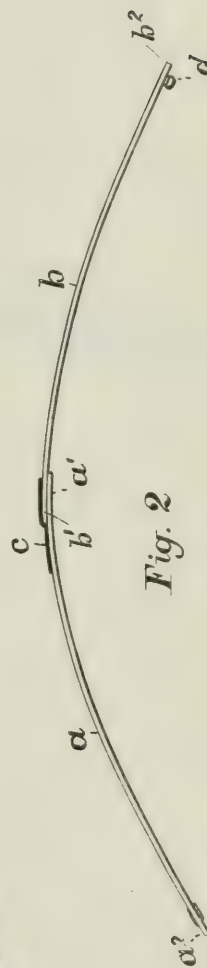


Fig. 2



Attest;

M. U. Latham  
F. O. Latham

Inventor,

Major D. Porter;

By A. B. Latham  
His Attorney





M. D. PORTER.  
COLLAPSIBLE ACOUSTIC HORN

(Application filed July 31, 1899.)

(No Model.)

2 Sheets—Sheet 2.

Fig. 4

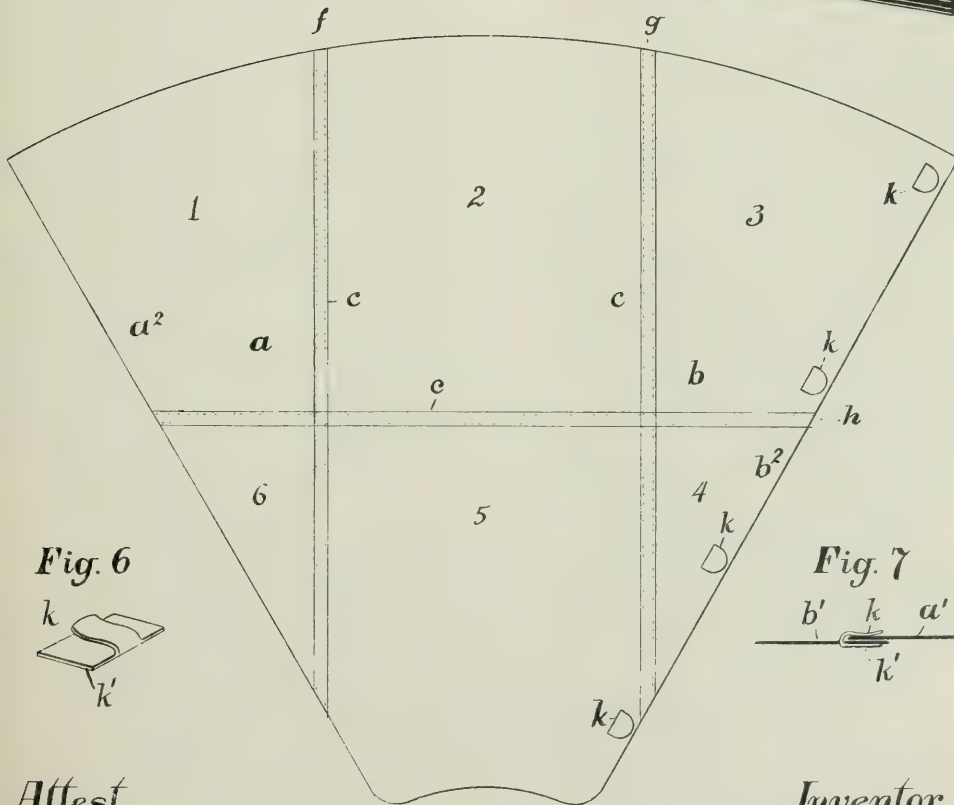
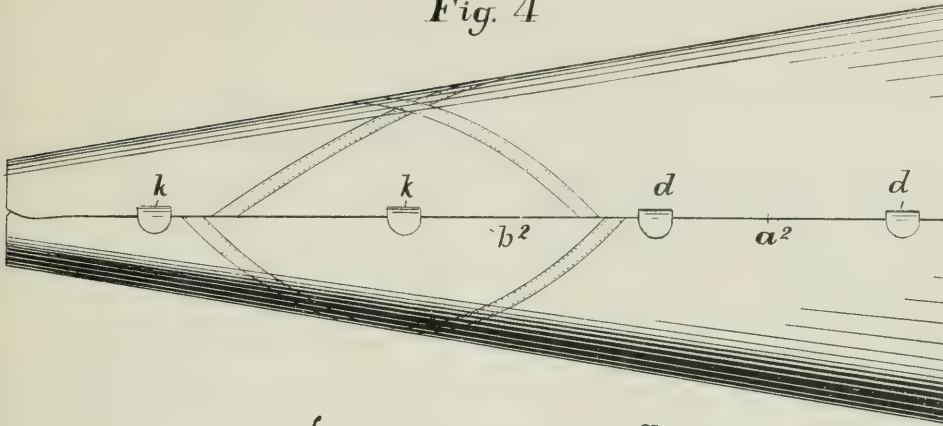
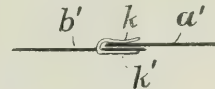


Fig. 6



Fig. 7



Attest

M. E. Upham  
F. E. Haller

Fig. 5

Inventor,

Major D. Porter;

By A. B. Upham  
His Attorney



MAJOR D. PORTER, OF NEW HAVEN, CONNECTICUT, ASSIGNOR TO THE  
INTERNATIONAL STYLOPHONE COMPANY, OF SAME PLACE.

## COLLAPSIBLE ACOUSTIC HORN.

SPECIFICATION forming part of Letters Patent No. 648,994, dated May 8, 1900.

Application filed July 31, 1899. Serial No. 725,634. (No model.)

*To all whom it may concern:*

Be it known that I, MAJOR D. PORTER, a subject of the Queen of Great Britain, residing at New Haven, in the county of New Haven and State of Connecticut, have invented a new and useful Collapsible Acoustic Horn, of which the following is a full, clear, and exact description.

The object of this invention is the construction of a horn for general acoustic purposes, such as what is usually termed a "megaphone," or for phonographs and other talking-machines, which horn shall be capable of being folded into the smallest possible compass for greater convenience in transportation and storage, and yet can be immediately expanded into its perfect and normal condition for use. In accomplishing these results I form the horn from moderately-thin press-board, celluloid, or other material capable of ready, but not too easy, bending, and divide it longitudinally into two or more sections, with certain edges hinged together and the others provided with fastening devices easily engaged or disengaged. An ordinary hinged connection will not do for this purpose, however, as I have found from experiment, for the material being pliable only to a limited degree the hinges will become the apex of a somewhat-acute angle instead of an evenly-rounded curve. To remedy this defect in a simple and inexpensive manner, I form the hinge of some fabric or other pliable material and locate the same at some little distance back from the edge of one of the sections. By this means the outjutting edge serves as a fulcrum, which compels the material itself to bend instead of the hinge, and thereby gives to the horn the circular line in cross-section which is required.

Referring to the drawings forming part of this specification, Figure 1 is a perspective view of the horn embodying my invention. Fig. 2 is a transverse section of the same with the two sections thereof unfastened at one edge. Fig. 3 is a transverse section of said sections folded back to back. Fig. 4 is a side elevation of an improved form of my horn. Fig. 5 is a plan view of this latter horn laid flat. Fig. 6 is a perspective view of my preferred form of fastening for the edges of the

horn-sections, and Fig. 7 is a detail sectional view showing the manner in which the edges of the horn-sections are held by said fastening.

Turning to Fig. 1, it will be seen that the horn is composed of the two sections *a* and *b*, held together at the edges *a'* *b'* by a hinge *c*, preferably formed of fabric or leather. As shown, said edges overlap for a short distance, usually about half an inch, in order to pre-serve the true curve of the horn, as above set forth. For the same purpose the section edges *a''* *b''* are made to overlap for a similar distance and provided with fastenings *d* for securing them together. Such fastenings may be the common ball-and-socket devices used for gloves and purses, as indicated in the drawings. The hinge *c* is adapted to permit the two horn-sections to be folded back to back, as in Fig. 3, and thereby enable the same to lie perfectly flat.

In my preferred construction I divide the horn into six sections, as shown in Fig. 5, in order to enable the same to be folded into the smallest possible compass. The lines of severance for this purpose are three in number *f*, *g*, and *h*, *f* and *g* running parallel to each other and *h* at right angles with the others. The last of said lines of severance *h* is adapted to be folded in either direction, but the lines *f* *g* are hinged substantially like that of the construction illustrated in Figs. 1, 2, and 3.

The fastening devices for the edges *a''* *b''* are formed, as shown in Figs. 6 and 7, where the thin base *k'* is provided with the thin flattened hook *k*. Said base is affixed to the under side of the edge *b''*, preferably by being stitched thereto, with the hook *k* reaching through a slit therein to the upper surface thereof. (See Fig. 7.) The mouth of this hook is arranged, as in Fig. 7, in order to receive the edge *a'* of the opposite section, and the opening is slightly constricted to receive said edge quite tightly, and thereby securely retain it.

In knocking down this horn the edge *a'* is first withdrawn from the grip of the fastenings *k*, then the sections 1 and 6 are folded over upon the sections 2 and 5, then the sections 3 and 4 are brought over upon the first-named ones, and, finally, the superposed sections 4, 5, and 6 are folded over upon the



combined sections 1, 2, and 3. The entire horn now occupies a space covering no more area than the single section 2, with a thickness equal to the six layers of the material composing the horn. Thus reduced in dimensions the horn can be packed in a very small compass and is hence capable of being carried from place to place in a small grip, a coat-pocket, or similarly-convenient receptacle. While this perfectly adapts the horn for use as a megaphone easy to be carried about and yet ready for use at a moment's notice, my preferable or most valued use for the same is in connection with phonographs. By packing this horn within the case arranged for the phonograph the entire talking-machine is complete, and yet occupies substantially no more space than the sounder mechanism alone. This is a most convenient arrangement for those giving phonograph entertainments at private parties or elsewhere necessitating the machine's being carried from place to place.

What I claim as my invention, and for which I desire to secure Letters Patent, is as follows, to wit:

1. In a collapsible horn, the combination of the sections formed of resilient material and hinged together along a substantially-longitudinal line, said hinge being adapted to permit said sections to be folded back to back but will compel flexure of the material itself when the free edges of the sections are brought together to form the horn, and fastening devices for said free edges, substantially as set forth.

2. In a collapsible horn, the combination of the sections formed of resilient material and hinged together along a substantially-longitudinal line, said hinge being formed of flexible material affixed to the edge of one section and a short distance back of the corresponding edge of the other section, whereby each overlapping edge is adapted to compel flexure of the material composing said sections when they are brought into the desired conical

form, and fastening devices for the free edges of said sections, substantially as and for the purpose set forth.

3. In a collapsible horn, the combination of the sections formed of resilient material and hinged together along a substantially-longitudinal line, and the fastening devices for the free edges of said sections, said fastening devices comprising the thin flat hooks having the bases affixed to the edge of one of said sections and adapted to receive and retain the edge of the other section, substantially as set forth.

4. In a collapsible horn, the combination of the plurality of sections formed of resilient material and shaped as shown, the flexible hinges securing the same together, and the fastening devices for the free edges of said sections, substantially as set forth.

5. In a collapsible horn, the combination of the sections formed of material capable of moderately-resisting flexure, the dividing-line between said sections being substantially longitudinal, and means for securing together the edges of said sections, such means being adapted to compel flexure of the sections themselves and thereby preserve the true conical shape of the horn, substantially as and for the purpose set forth.

6. In a collapsible horn, the combination of the sections formed of resilient material, the flexible hinges uniting said sections, and the fastening devices for securing together the exposed edges of said sections, two of the division-lines of said sections being parallel and substantially longitudinal therewith and the other at right angles to said parallel lines, substantially as set forth.

In testimony that I claim the foregoing invention I have hereunto set my hand this 14th day of June, 1899.

MAJOR D. PORTER.

Witnesses:

GUY H. HOLLIDAY,  
A. B. UPHAM.

**[Defendant's Exhibit "N"—Letters Patent No. 699,928, to C. McVeety and J. F. Ford, Patented May 13, 1902.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "N." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "N." Received Aug. 19, 1913. F. D. Monckton, Clerk.



C. McVEETY &amp; J. F. FORD.

SHIP'S VENTILATOR.

(Application filed July 10, 1901.)

(No Model.)

FIG. 1.

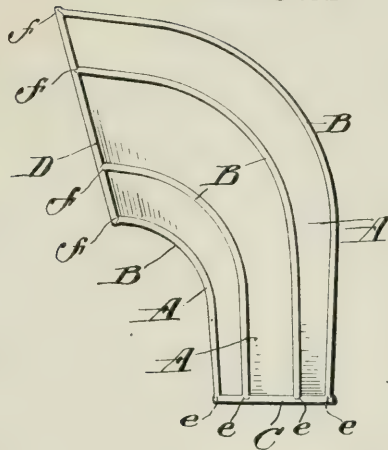


FIG. 4.

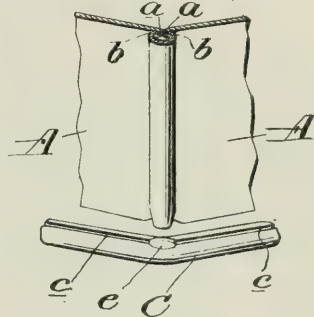


FIG. 2.

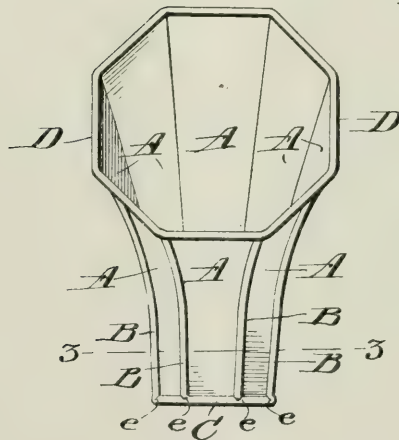
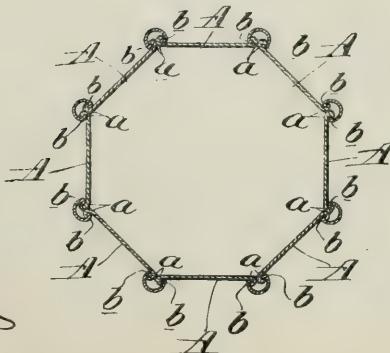


FIG. 3.



WITNESSES:

Brooman S. Steading  
 Richard H. Sharp

INVENTORS

Charles McVeety  
 John Ford  
 by their attorney  
 Walter W. Calhoun





# UNITED STATES PATENT OFFICE.

CHARLES McVEETY AND JOHN F. FORD, OF PHILADELPHIA, PENNSYLVANIA.

## SHIP'S VENTILATOR.

SPECIFICATION forming part of Letters Patent No. 699,928, dated May 13, 1902.

Application filed July 10, 1901. Serial No. 67,714. (No model.)

*To all whom it may concern:*

Be it known that we, CHARLES McVEETY and JOHN F. FORD, citizens of the United States, residing at Philadelphia, in the county of Philadelphia and State of Pennsylvania, have invented certain new and useful Improvements in Ships' Ventilators, of which the following is a specification.

Referring to the accompanying drawings, forming part of this specification, Figure 1 illustrates a side elevation of a ventilator constructed in accordance with our invention. Fig. 2 represents a front elevation of the same. Fig. 3 shows a horizontal section on the line 3-3 of Fig. 2; and Fig. 4 represents a detached perspective view of a portion of the ventilator, showing the manner of uniting the parts.

The object of our invention is to construct a ventilator of that type known as "ships' ventilators" in the simplest and most economical manner, the plates of which the ventilator is made being stamped out in one operation, requiring no delicate bending and fitting, as is required in other types of ships' ventilators.

Referring to the reference-letters of the drawings, A A represent the plates, which are of varying width and provided at the sides with upturned portions *a*, forming grooves for the reception of the ribs B, which are in the form of split tubes, the inward-projecting portions *b* being adapted to engage the grooves of the plates A.

In Figs. 1, 2, and 3 of the drawings we have shown the ventilator constructed of eight plates or sections forming an octagonal figure in cross-sections and at the base and mouth. It will be understood, however, that any num-

ber of plates, as A, may be employed without departing from the scope of our invention.

As shown in Fig. 4, the plates A at the base and mouth of the ventilator are covered with beadings C and D, having slots *c* and *d* to receive the plates A and openings *e* and *f* to receive the ribs B. The beadings C and D are firmly secured by brazing metal to the plates A and ribs B.

Having described our invention, what we claim, and desire to secure by Letters Patent, is—

1. A ventilator comprising in combination with a series of curved plates of gradually-increasing width having upturned edges forming grooves, a series of split tubes or ribs for engaging the grooves of said plates, and ribs arranged at the base and mouth having grooves engaging the plates and openings to receive the ribs substantially as specified.

2. A ventilator comprising a curved tapered pipe octagonal in cross-section composed of plates A, having upturned end forming grooves, ribs B in the form of split tubes for engaging and holding said plates in position, and ribs C and D arranged respectively at the base and mouth of the ventilator having slotted openings to receive the plates and openings for the ribs, substantially as specified.

In testimony whereof we affix our signatures in presence of two witnesses.

CHARLES McVEETY.  
JOHN F. FORD.

Witnesses:

C. P. S. GARWOOD,  
H. E. COUGHLIN.



**[Defendant's Exhibit "O"—Letters Patent No. 739,954, to G. H. Villy, Patented September 29, 1903.]**

[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "O." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "O." Received Aug. 19, 1913. F. D. Monckton, Clerk.



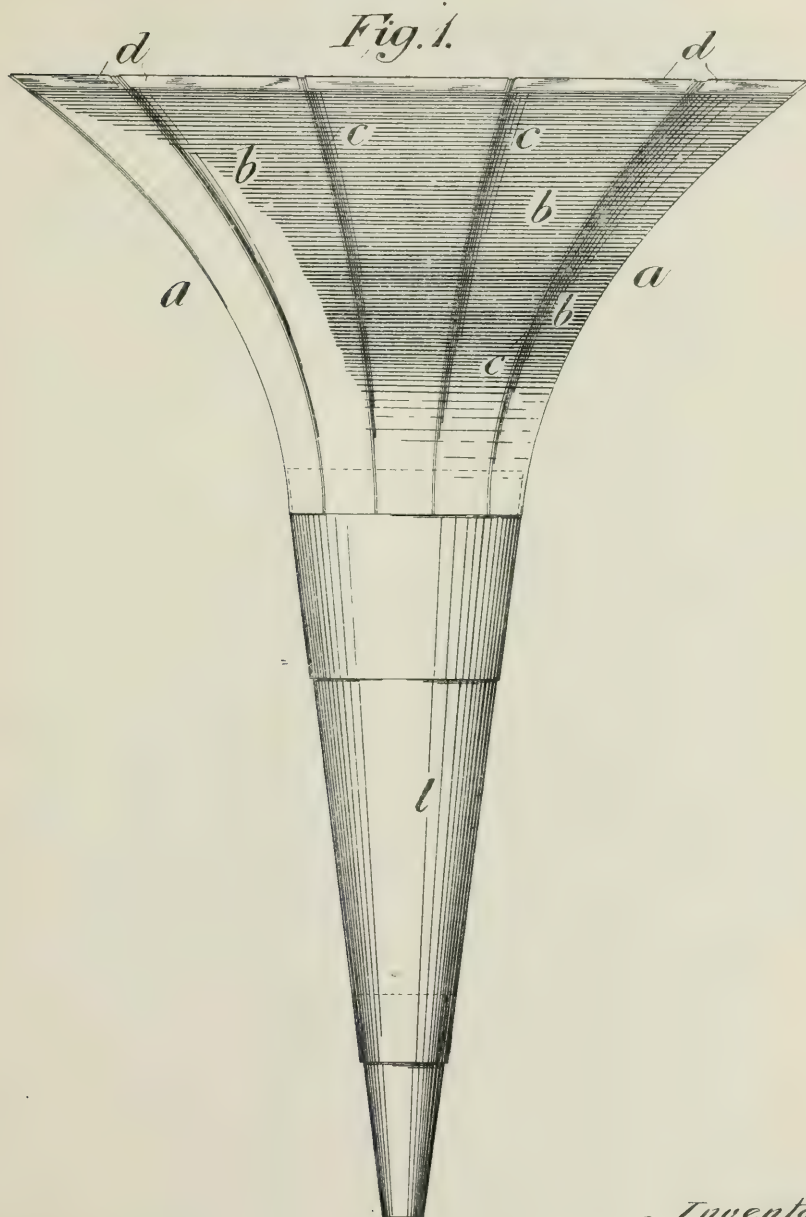
G. H. VILLY.

HORN FOR PHONOGRAPHS, EAR TRUMPETS, &amp;c.

APPLICATION FILED DEC. 8, 1902.

NO MODEL.

3 SHEETS—SHEET 1



Witnesses:  
*L. Hilton*  
*A. Veazie*

- Inventor -  
*Gustave H. Villy*  
By *H. B. Wilson & Co.*  
Attorneys -





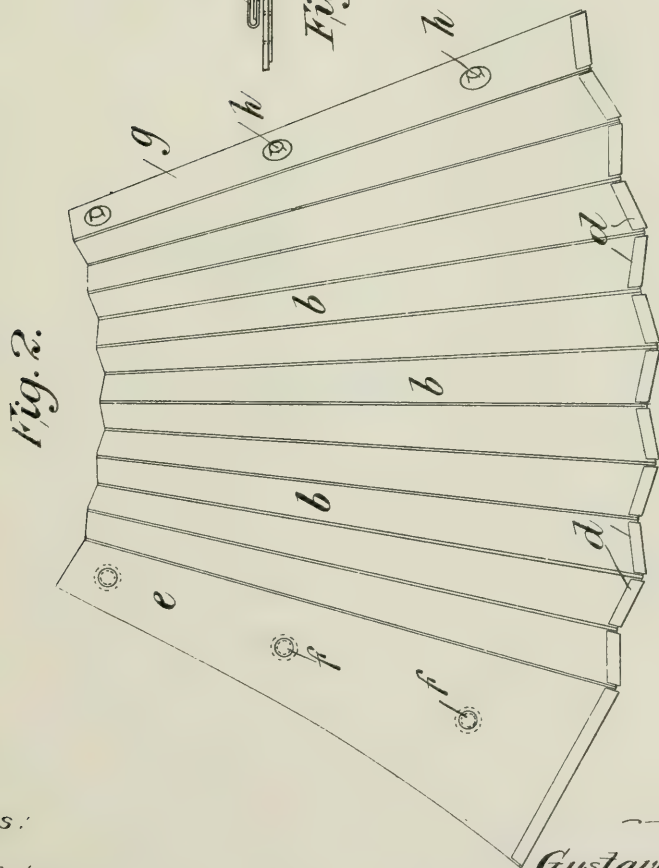
G. H. VILLY.

HORN FOR PHONOGRAPHS, EAR TRUMPETS, &amp;c.

APPLICATION FILED DEC. 8, 1902.

NO MODEL.

3 SHEETS—SHEET 2.



Witnesses:

*L. Hilton*  
*A. Veague*

Inventor

Gustave H. Villy

By *H. B. Villison & Co.*

Attorneys—



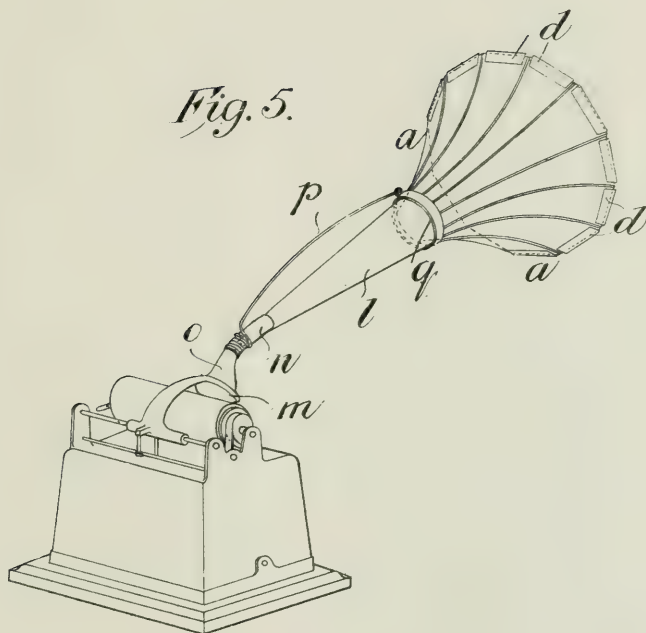
G. H. VILLY.

HORN FOR PHONOGRAPHS, EAR TRUMPETS, &c.

APPLICATION FILED DEC. 8, 1902.

NO MODEL.

3 SHEETS—SHEET 3.



Witnesses

*L. Hilton*  
*A. Veague*

Inventor.

*Gustave H. Villy*

By

*A. B. Wilson & Co*

Attorneys



# UNITED STATES PATENT OFFICE.

GUSTAVE HARMAN VILLY, OF MANCHESTER, ENGLAND.

## HORN FOR PHONOGRAPHS, EAR-TRUMPETS, &c.

SPECIFICATION forming part of Letters Patent No. 739,954, dated September 29, 1903.

Application filed December 8, 1902. Serial No. 134,413. (No model.)

### *To all whom it may concern:*

Be it known that I, GUSTAVE HARMAN VILLY, a subject of the King of Great Britain and Ireland, residing at 5 Longford Place, Longsight, Manchester, in the county of Lancaster, England, have invented certain new and useful Improvements in Connection with Horns for Phonographs, Ear Instruments, and for Like Purposes, (for which I have made application for Letters Patent in Great Britain, No. 20,146, and dated 15th day of September, 1902,) of which the following is a specification:

This invention relates to improvements in connection with horns or trumpet-like sound distributors or collectors for use upon phonographs, gramophones, and other like instruments and also for ear-trumpets, fog-horns, and other sound distributing and collecting devices, the object being to provide a horn or trumpet-like device which can be folded when not in use, so as to be capable of ready transportation and for placing within the case of the phonograph or in the pocket of the user when it is to be applied to an ear instrument or the like.

The accompanying drawings represent one form of the invention.

Figure 1 is an elevation of the complete or erected horn. Figs. 2, 3, and 4 are detail views illustrating the manner in which the horn can be collapsed or folded. Fig. 5 is a perspective view illustrating one convenient application of the improved horn to a phonograph. Fig. 6 is a detail view on an enlarged scale.

In carrying my invention into effect in one convenient manner when making my folding horn for use, particularly in connection with a phonograph or like instrument, I make the end *a* of trumpet-like or curved configuration with an enlarged outer end and a smaller end at the interior of the conoidal-like form. I make this enlarged and trumpet-like device by employing a series of strips *b*, of paper, wood, linen, or other preferably flexible material, the foundations of which I prefer to make of linen or the like, so as to form a hinge-like connection *c* between each of the strips, the members *b* of which I arrange so that while lying close together when extended

there is a dividing-line between them about which they can be folded upon the base of linen or the like connecting-web upon which the paper or other material is mounted. The longitudinal hinged edges *c* of the flexible segments or sectors *b* are curved in such manner that although the segments when opened out cannot lie in the same plane they can either be folded together in a zigzag manner, so as to lie parallel to one another, as shown in Figs. 2 to 4, or extended by springing or buckling into the requisite trumpet or bell-like form, as shown in Figs. 1 and 5. The angles formed by the meeting of the hinged segments when extended form, as it were, ribs, giving rigidity to the trumpet form. The outer ends of the segmental-like strips I prefer to protect by a bent or turned-over edging *d* of metal, making the connection rigid by pressing a portion of the strip of metal or other binding material into the edge of the paper or the like foundation.

Upon the extreme member *e* of the series of strips *b* thus formed into one band I provide eyelets for other clip-like devices for enabling snap projections *h* on the opposite end strip *g* to be engaged therewith and when thus engaged to form a completed trumpet-like sound-distributor.

Instead of arranging eyelets or hook-like clips upon the outer members of the series of strips I may make one to engage with the other by forming a bead-like connection or flange *k* upon one member, into which the corresponding projecting or engaging portions of the other may enter, as shown in Fig. 6. When providing for an extension and a long funnel-like carrier for the built-up trumpet-like end *a* to engage with, I sometimes make a conical tube *l*, the enlarged end of which engages with the inner end of the trumpet-terminal *a*, while the smaller end of the cone engages with the receiver *m* of the phonograph or enters into the rubber or other tubular or flexible connection which may be employed for use upon any particular instrument. I prefer to make this extended or carrying member *l* for the collapsible trumpet from paper or other suitable material built up in a similar manner to that hereinbefore described to my collapsible end, or the



cone may be made in a short length in one piece, or it may be made telescopic when so desired.

When providing for a flexible connection at the extreme end of the cone *l*, I attach a length of rubber or the like tubing *n*, which I bind with metal or other band at the end for the purpose of inserting it upon the funnel *o* of the phonograph-reproducer, and I stiffen the combination trumpet and funnel with flexible end by providing one or more bars *p* of metal or the like stiffeners which support the funnel by means of elastic or other connections *q*, arranged upon the cone end and suspended from the projecting stiffening hook or members *p*, carried from the metal end or binder of the flexible tube *n*.

When constructing a funnel or tube for an ear-trumpet or for a fog or speaking horn or the like, I employ the same method of building up the segments to form the expanding-surface, modifying the arrangement of the inner end to suit the connection that is to be made therewith, so that when the trumpet is in use it can be extended and a large outer area exposed for the collection of sound and when not in use it can be folded, each segment upon the other, so as to occupy but little space—that is to say, a trumpet such as illustrated in Figs. 1 to 4 would be suitable as an ear-trumpet.

I am aware that it has hitherto been proposed to form conical or pyramidal horns from cardboard provided with a linen foundation; but such horns have been made up from a single flat scored sheet or from a number of flat triangular strips having straight edges. Such horns could be developed or laid out upon a flat surface. Owing to their formation if such horns were made collapsible they would have to be sustained in their conical form by additional sustaining means, or if they were made self-sustaining they could not be made collapsible. In contradistinction to this my collapsible horn could not be made up from a single flat sheet, as each strip has to be made with curved edges, and when the strips are flexibly secured together at such curved edges the whole or complete surface so formed cannot be laid out or developed on a flat surface. My horn, owing to the curvature of the edges of the strips, is self-sustaining and requires no additional stiffening or sustaining devices, although when it is desired to collapse the horn this may be effected by forcibly straightening and folding the strips one against the other in the manner hereinbefore described with reference to Figs. 2, 3, and 4. The horn when erected offers a decided resistance to such straightening or folding sufficient to render it self-sustaining against all ordinary shocks liable to be encountered; but it is found that when one strip has been forcibly straightened or folded

against another the equilibrium of the trumpet is destroyed and the whole may be easily collapsed.

I do not limit the application of my invention to any particular method of building up the segments or to any special curve or configuration of the same, and I vary the method of jointing and stiffening them to suit the material from which the strips are constructed and the foundation or base fabric upon which the flexible material forming the strips is secured.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. A collapsible but self-sustained phonograph-horn, ear-trumpet or the like comprised of a number of flexible strips having curved meeting edges substantially as set forth.

2. A collapsible but self-sustained phonograph-horn, ear-trumpet or the like comprising a number of flexible strips having curved meeting edges and mounted on a flexible foundation, substantially as and for the purposes hereinbefore set forth.

3. A collapsible but self-sustained phonograph-horn, ear-trumpet or the like comprising a number of flexible strips having curved meeting edges, a flexible foundation for said strips and means for detachably securing the two extreme strips together, substantially as set forth.

4. A collapsible but self-sustained phonograph-horn, ear-trumpet or the like comprising a number of flexible strips having curved meeting edges, flexible connections between such edges and protecting means on the outer exposed edges, substantially as set forth.

5. A phonograph-horn, ear-trumpet or the like comprising a rigid conical tube and a collapsible trumpet-shaped mouth the latter being made up of a number of flexible strips having curved meeting edges, and flexible connections at such edges, substantially as hereinbefore set forth.

6. A horn of the class described comprising a rigid conical tube, and a collapsible trumpet-shaped mouth made up of a number of flexible strips having curved meeting edges, said mouth being connected to said rigid conical tube, substantially as described.

7. A horn of the class described comprising a rigid conical tube, and a collapsible trumpet-shaped mouth made up of a number of flexible strips having curved meeting edges, said mouth being telescopically connected to said conical tube, substantially as described.

In witness whereof I have hereunto set my hand in presence of two witnesses.

GUSTAVE HARMAN VILLY.

Witnesses:

DORA VILLY,

V. A. B. HUGHES.



**[Defendant's Exhibit "P"—British Letters Patent  
No. 7594, to William Phillips Thompson, Pat-  
ented April 24, 1900.]**

2—390.

UNITED STATES OF AMERICA,  
DEPARTMENT OF THE INTERIOR,  
United States Patent Office.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true  
copy from the Bound Volumes of the Library of this  
Office of the Complete Specification and Drawings in  
the matter of the

British Letters Patent to  
William Phillips Thompson,  
Dated April 24, 1900,                      Number 7,594,  
for

Improvements in Graphophones or Phonographs.

IN TESTIMONY WHEREOF, I have hereunto  
set my hand and caused the seal of the Patent Office  
to be affixed at the City of Washington, this 25th day  
of November, in the year of our Lord one thousand  
nine hundred and eleven, and of the Independence  
of the United States of America the one hundred and  
thirty-sixth.

[Seal]

F. A. TENNANT,  
Assistant Commissioner of Patents.





*Date of Application, 24th Apr., 1900—Accepted, 23rd June, 1900*

### COMPLETE SPECIFICATION.

#### Improvements in Graphophones or Phonographs.

A communication by GEORGE L. HOGAN, of the City of Baltimore, State of Maryland, United States of America, Electrical Engineer.

I, WILLIAM PHILLIPS THOMPSON, F.C.S., M.I.M.E., Agent for Foreign Patent Solicitors, 6, Lord Street, Liverpool, and 6, Bank Street, Manchester, both in the County of Lancaster, 118, New Street, Birmingham, in the County of Warwick, & 322, High Holborn, in the County of Middlesex, Civil Engineer,  
do hereby declare the nature of this invention and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement:—

This present invention pertains to improvements in graphophones or phonographs, the construction and advantages of which will be hereinafter set forth, reference being had to the annexed drawings, wherein—

Fig. 1 is a side elevation of the machine as a whole;

Fig. 2, a top plan view;

Fig. 3, a perspective view of a portion of the trumpet and the reproducing point or stylus;

Fig. 4, a perspective view of the trumpet and its supporting arm;

Fig. 5, a transverse sectional view of a portion of the trumpet, showing the means employed for connecting its edges;

Fig. 6, a similar view illustrating a modified form thereof;

Fig. 7, a side elevation, partly in section, of a modified form of trumpet, and

Fig. 8, a side elevation of a record-supporting spool or holder, with the sound record shown in section thereon.

The main object of this invention is to produce a simple, cheap, and yet highly efficient phonograph.

With the construction hereinafter described, many advantages present themselves, more particularly in the method employed for imparting motion by hand to the sound record, whereby an even application of power is obtained; and again, in the manner in which the trumpet is secured together, and further, in the means employed for supporting the trumpet, all of which will be set forth in detail.

Other objects and advantages will appear in the following description.

Referring first to Figs. 1 and 2, A denotes the base or main frame of the instrument, supported upon two fixed legs B, B, and an adjusting screw C' by means of which the base may be brought to its proper level position.

Rising from the base, preferably at one side thereof, is an upright arm or member D in the rear upper portion of which there is formed an upwardly and rearwardly extending slot E, while a similar slot is formed in a corresponding arm upon the opposite side of the base. These slots constitute the supports or bearings for the ends of the axle F of the record spool G. The axle may be formed in one piece and extend from end to end of the spool, or it may comprise simply two short pins secured in the ends of the spool.

[Price 8d.]

As will be noted upon reference to Figures 2 and 8, the spool or support G is provided at one end with a pulley H.

Mounted and fixed upon a suitable axle journalled in the forward portion of the upright wall or member D, is a band pulley I, while connected to the outer end of said axle is a crank I<sup>1</sup> for imparting motion thereto. A second axle is secured in the upright member D, and upon this is loosely mounted a small pulley J, having formed integral therewith or connected thereto a fly-wheel K.

Suitable elastic bands L, such for instance as rubber, connect the pulleys I and J, and pulley J with the pulley H of the record spool or support.

Where power is applied to the crank by hand, it is next to impossible to turn the same with that evenness which is necessary to the best results in a phonograph,—especially so where a musical record is being used. By reason of the yielding of the elastic bands, which work in conjunction with the fly-wheel, the motion which is imparted to the record support or spool is quite even. In other words, should the operator give a sudden jerky motion to the crank, it will not be imparted to the record, but will be taken up and absorbed in a great measure by the yielding of the band or bands. By the use of elastic bands, the record or record support may be easily withdrawn from its bearings, and a new one introduced. The elastic band, working on the record support, serves to hold said support to its proper place relative to the bearings or slots E.

For the sake of lightness and appearance, the central portion of the base is cut away or left open in the process of manufacture; and extending forwardly from this open portion is a slot M, preferably closed at its forward end.

N denotes the trumpet support, which is preferably of the form illustrated in Figures 1 and 4; that is to say, comprises a long, tapering arm carrying at its forward end an upwardly extending point or finger O. The opposite end of the support extends down and is broadened out somewhat, presenting a flat bearing surface which rests upon the base at each side of the slot when the parts are assembled.

To maintain the parts in place, the support is provided with a downwardly extending T-shaped member P, the body of which passes through the slot, while the laterally extending arms engage the under face of the base,—see Fig. 1. To prevent any lateral or sidewise movement of the support, a downwardly extending stud or lug Q is also provided, which projects into the slot, as indicated in dotted lines in Figure 1. From this it will be seen that the support is firmly held in its proper relation to the base, that it may be adjusted back and forth in the slot, and may be readily detached and removed from the base when it is desired so to do.

R denotes the trumpet, the body of which is made of relatively thin, tough paper, papier-mâché, indurated fibre, isinglass, gelatin, or preferably, celluloid, formed of a single piece and having its edges joined together by a strip of sheet-metal in the manner illustrated in Fig. 5, or that shown in Fig. 6. In place of the sheet-metal binding strip a strip of celluloid, formed so as to embrace the adjacent edges of the sheet may be used, in which case the binding strip and the edges of the sheet will be held together by celluloid glue, or some similar material.

In Fig. 5 it will be seen that the edges of the trumpet overlap one another and are embraced between the folds of the reversely turned edges of a sheet-metal strip or a strip of celluloid, said strip extending from end to end of the trumpet, as is clearly indicated in Figs. 1 and 4.

In Fig. 6 two pockets are formed in the binding strip by bending it as shown, that is to say, by first bending the edges of the strip toward the centre of the body, and then outwardly again upon the inturned portion, the edges of the trumpet body being inserted into the spaces or pockets thus formed.

With both forms of connecting device, when the parts are assembled, a suitable cement is employed to ensure close contact and firm adhesion,—in the case of the metal strips, said strips and the edges of the trumpet are of course squeezed



*Thompson's Improvements in Graphophones or Phonographs.*

together or otherwise brought into close and intimate contact, so that there can be no independent vibration of the parts one relatively to the other.

Celluloid is perhaps the best material which can be employed in the construction of a trumpet, particularly for the class of machines similar to that herein shown and described. It is light, and when built up in the manner described, is highly resonant, is durable, cheap, and also possesses many other advantages which are apparent to any one familiar with this art.

While the trumpet has been shown in connection with a particular form of phonograph, still it is apparent that it may be used with any type of machine to great advantage.

Soldered or otherwise secured to the forward end of the binding strip S is an arm T, the main body of which stands at a slight distance from and parallel to said binding strip. It is provided throughout its length with inturned or locking edges U adapted and designed to engage with similar outwardly turned edges of a U-shaped member V. In the lower side of said member V there is formed an opening W through which the finger O of the supporting arm extends, the upper pointed end of said arm bearing against the under face of the arm T, as indicated in Fig. 1. The opening W is of such size as not to bind upon the arm or finger O, but to permit a slight free movement of the parts.

At or near the rear end of the binding strip S, there is secured by solder or otherwise, a holding and clamping device for the point or stylus X of the graphophone. Said clamping device comprises two spring arms Y and Z, the arm Y being nearest to the strip, while the arm Z which is somewhat longer, stands in a plane below the arm Y and has secured to it a rounded support or seat a.

The reproducing point or stylus X, in the form shown, comprises a short section of glass tubing or rod, having one end closed, if a tube, and drawn down to a point to form the working point, while the body thereof surrounds the arm Y and rests upon the support a, as is most clearly shown in Fig. 3.

Interposed between the binding strip S and the upper-face of the body of the stylus or reproducing point, is a cushion b, preferably formed of leather or a somewhat similar yielding substance.

From the foregoing it will be seen that the stylus may be moved back and forth upon its support, so that its point may be projected beyond the end of the trumpet, as indicated in Figs. 3 and 4, or may be directly below the trumpet as indicated in Figs. 1 and 2.

The record support (shown in Fig. 8) is cut away throughout the major portion of its length to render it light in weight, while at the same time it affords a sufficient bearing at each end for the record or cylinder employed.

In Fig. 7 a modified form of the trumpet is shown, which, instead of being a true cone or a frustum of a cone, consists of a main portion c, which may be a true cone or a frustum of a cone having connected to it two or more sections d e each of which is a frustum of a cone made upon a different angle from each other and from the main body so as to produce a flaring-shaped trumpet. The various sections of the trumpet will be made of the material before mentioned, and will be connected throughout their length by fastenings similar to those shown in Figs. 5 and 6. The adjacent or abutting ends of the various sections will have secured upon them metal strips or bands f, which will embrace the ends and which strips in turn will be soldered or brazed to each other entirely around the trumpet. The outer end of the trumpet will also preferably be provided with a sheet-metal strip or ring securely held thereon by some cementitious substance and pressure, as above described in connection with the binding strip S.

While my correspondent has shown and described this modified form of trumpet as being made up of a series of cone frusta, it is of course possible to make it up of a series of pyramid frusta, though, from many points of view, the conical form is preferable.

*Thompson's Improvements in Graphophones or Phonographs.*

From the foregoing description it will be seen that when the parts are assembled, the trumpet will swing upon the finger O and that the stylus or point X will follow the sound writings upon the cylinder or other sound record being used. By reason of the adjustability of the arm or trumpet support N the stylus or point can be brought to its proper position relative to the cylinder so that the best results may be obtained. It will be noted that the supporting member V is also adjustable with relation to the arm U, and that a certain degree of elasticity is present in said arm U. By these adjustments the proper degree of pressure necessary to be had upon the reproducing point is secured, and the parts may be adjusted with a nicety which is requisite to the best results.

A variation in the character of the sound reproduced may also be obtained by adjusting the stylus back and forth with relation to the trumpet.

While my correspondent has shown an apparatus designed to be driven by hand, it is manifest that instead of the mechanism illustrated, a spring or other motor may be employed for imparting the necessary rotation to the spool G which supports the record.

Having now particularly described and ascertained the nature of the said invention and in what manner the same is to be performed, as communicated to me by my foreign correspondent, I declare that what I claim is:—

1. In a phonograph, the combination of a suitable base; arms extending upwardly therefrom; a rearwardly extending slot formed in each of said arms; a record support provided with axles extending from its ends and adapted to rest in said slots; and means for imparting motion to said support.

2. In a phonograph, the combination of a suitable base; arms extending up therefrom; a rearwardly extending slot formed in each of said arms; a record support journaled in said slots; a driving pulley; and elastic connections intermediate said pulley and the support for imparting motion to the latter, substantially as described.

3. In a phonograph, the combination of a suitable base; a record support journaled thereon; a power pulley; and elastic connections intermediate said pulley and the record support for imparting motion to the latter, substantially as and for the purpose described.

4. In a phonograph, the combination of a suitable base; a record support journaled thereon; a power pulley; a fly-wheel; and elastic connections intermediate the record support, the fly-wheel, and the power pulley, substantially as and for the purpose described.

5. In a phonograph, the combination of a suitable base; means for holding a sound record rotatably thereon; a source of power; a fly-wheel; and elastic driving bands connecting the record-holding means and the fly-wheel, and said fly-wheel and the source of power.

6. In a phonograph, the combination of a suitable base; arms or supports extending up therefrom, each provided with an upwardly and rearwardly inclined slot; a record support having its bearings resting in said slots; a power pulley I; a pulley J located intermediate said pulley I and the record support; a fly-wheel working with said pulley J; and elastic bands L connecting the power pulley I and the record support with pulley J.

7. In a phonograph, the combination of a suitable base; a record support carried thereby; a trumpet; and an adjustable support for the trumpet mounted upon the base.

8. In a phonograph, the combination of a suitable base; a record support carried thereby; a trumpet; and a yielding support for the trumpet, substantially as described.

9. In a phonograph, the combination of a suitable base; a record support carried thereby; a trumpet; and an adjustable and yielding support for the trumpet, substantially as described.

10. In a phonograph the combination of a suitable base; a record support



*Thompson's Improvements in Graphophones or Phonographs.*

carried thereby; a trumpet; an adjustable support for the trumpet mounted on the base; and means for adjusting the level of the base.

11. In a phonograph, the combination of a suitable base; a record support carried thereby; a trumpet, an adjustable and yielding support for the trumpet; and means for adjusting the level of the base.

12. In a phonograph, the combination of a suitable base; a record support carried thereby; a trumpet pivotally supported at its outer end and having its inner end above the record support; and means for adjusting the level of the base; substantially as and for the purpose described.

13. In a phonograph, the combination of a suitable base; a record support carried thereby; a trumpet; and means carried by the base for adjusting the trumpet toward and from said support, substantially as described.

14. In a phonograph, the combination of a suitable base; a record support; a trumpet; an arm adjustably connected to the forward end of said base and extending out therefrom; and pivotal connections intermediate said arm and the trumpet, whereby the rear end of the trumpet may be adjusted with relation to the record, and is free to move both laterally and vertically, substantially as described.

15. In a phonograph, the combination of a suitable base; a record support; a trumpet; an arm adjustably connected to the forward end of said base and extending out therefrom; a finger extending up from said arm; and connections, substantially as described, between said finger and the trumpet.

16. In a phonograph, the combination of a suitable base; a record support carried thereby; a slot formed in the forward portion of the base; an arm N provided with means working in conjunction with the slot for adjustably attaching said arm to the base; a finger O extending up from the forward end of arm N; a trumpet; an arm U connected to the under side of the trumpet; and a member V connected to said arm and provided with an opening through which the finger O extends.

17. In combination with a phonographic trumpet, a point or stylus connected thereto, said stylus comprising a section of glass tubing or rod drawn to a point at one end.

18. In combination with a phonographic trumpet, a reproducing point or stylus, said stylus comprising a section of glass tubing or rod drawn to a point at one end; means for holding the stylus in close contact with the trumpet; and a cushion interposed between the stylus and the trumpet.

19. In combination with a phonographic trumpet, a reproducing point or stylus, comprising a section of glass tubing or rod drawn to a point at one end; a support for said stylus, consisting of two arms Y and Z attached to the trumpet; and a cushion intermediate the tube and trumpet, substantially as described.

20. In combination with a phonographic trumpet, a reproducing point or stylus, comprising a section of glass tubing or rod drawn to a point at one end; a support for said stylus, comprising two arms Y and Z; a bearing *a* attached to said arm Z; and a cushion interposed between said stylus and the trumpet.

21. In combination with a phonographic trumpet, a reproducing point or stylus, comprising a section of glass tubing or rod drawn to a point at one end; and means for adjustably connecting the stylus to the trumpet, substantially as described.

22. A trumpet for phonographs, composed of a single sheet of resonant material having its edges clamped and held together by a single strip of metal or the like, substantially as described.

23. A trumpet for phonographs, composed of a single sheet of resonant material bent to form, and having its edges treated with a cementitious substance and held together by a single strip of metal or the like bent around them, substantially as described.

24. A trumpet for phonographs, comprising a single sheet of resonant

*Thompson's Improvements in Graphophones or Phonographs.*

material bent to form; and a strip of metal shaped to form pockets adapted and designed to receive and hold the proximate edges of the sheet, substantially as described.

25. A trumpet for phonographs, comprising a main body portion composed of a single sheet of resonant material bent to form, and having its proximate 5 edges secured together; and an additional flaring section secured to the outer end of the main body, said flaring section being likewise formed of a single sheet of resonant material having its proximate edges secured together, substantially as described.

26. A trumpet for phonographs, comprising a main body portion and a series 10 of connected sections attached to the large end of the body portion, each succeeding section having its walls more flaring than those of the preceding one, substantially as described.

27. A trumpet for phonographs, comprising a main body portion and a series 15 of connected sections attached to the large end thereof, each succeeding section having its walls more flaring than those of the preceding, and the main body and each of the sections being each formed from a single sheet of fibre having its proximate edges secured together by a strip of metal or the like, substantially as described.

28. A trumpet for phonographs, comprising a main body portion conical in 20 form and composed of a single sheet of resonant material having its proximate edges secured together by a strip of metal or the like; and a series of connected sections attached to the large end of the main body, each succeeding section being in outline a frustum of a cone, having a larger base than the preceding and each formed of a single sheet of resonant material having its proximate 25 edges connected by a metal strip or the like, substantially as described.

29. A supporting spool for phonographic sound records having its central portion cut away or reduced in diameter, and having a pulley formed at one end thereof, substantially as described.

30. A trumpet for phonographs or the like, composed of celluloid or its 30 described equivalent.

31. A trumpet for phonographs composed of a sheet of celluloid bent to form and having its proximate edges secured together in a manner substantially as herein set forth.

Dated this 23rd day of April 1900.

35

WM. P. THOMPSON & Co.,  
Agents.

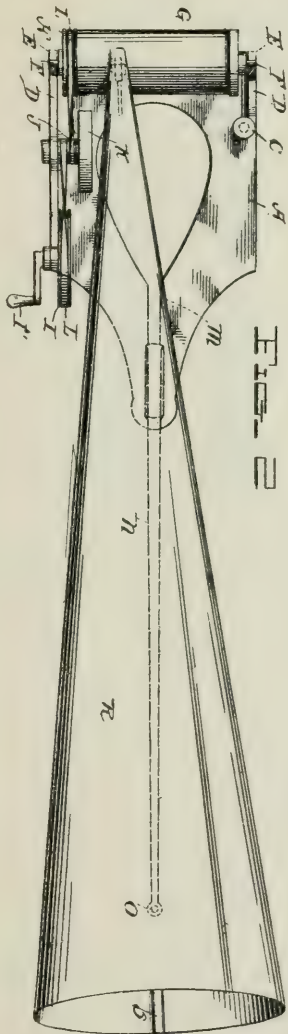
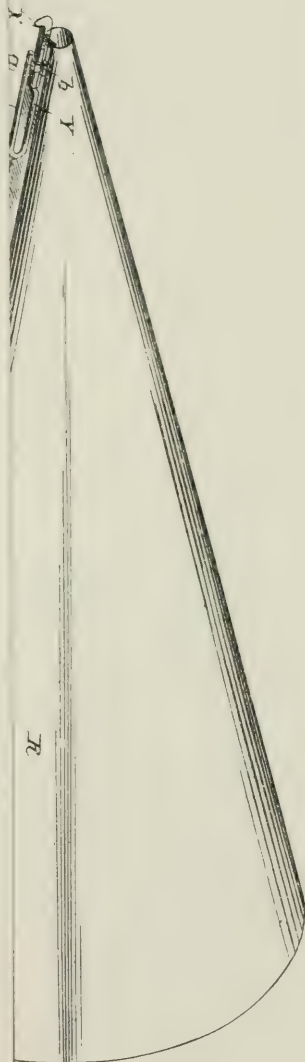
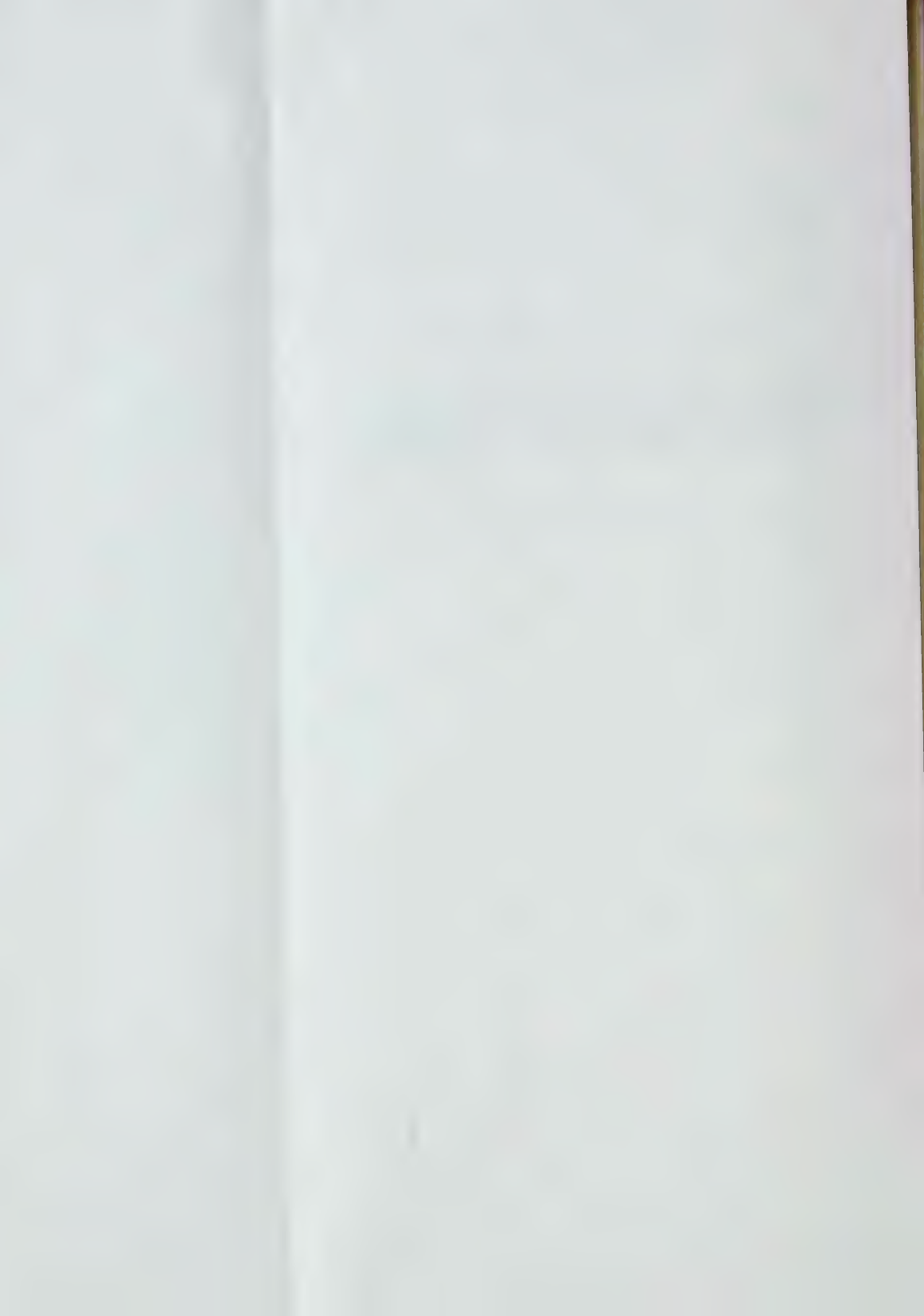


FIG. 2



[This Drawing is a reproduction of the Original on a reduced scale.]

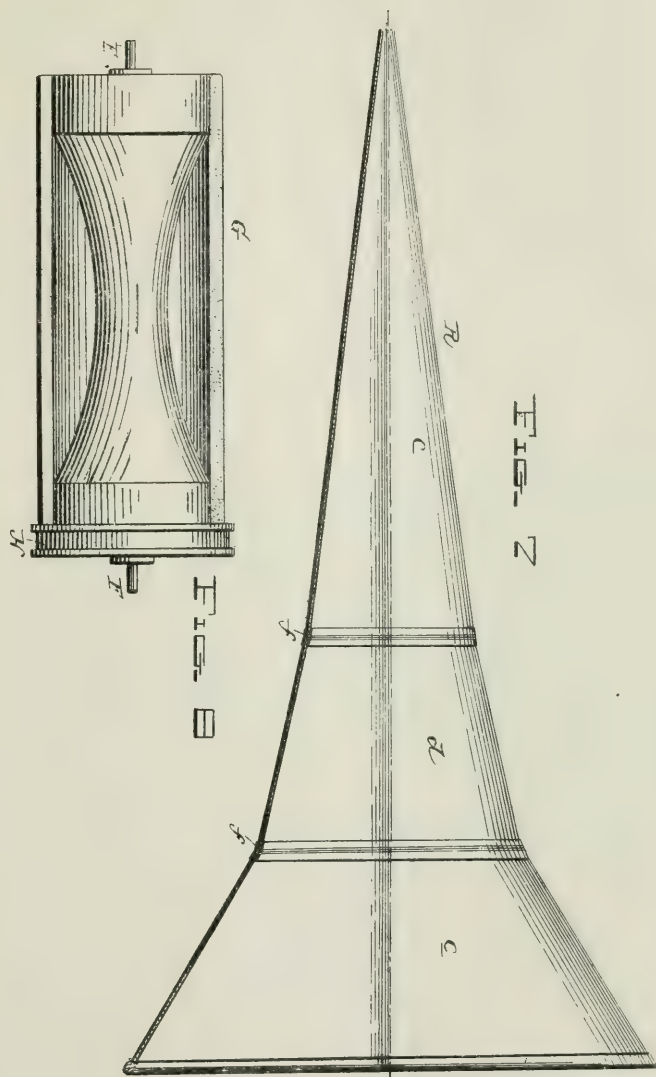












[This Drawing is a reproduction of the Original on a reduced scale]



[Endorsed]: No. 15,326. U. S. Dist. Court, Nor.  
Dist. of Cal. Dfts. Exhibit "P." Oct. 2, '12. W.  
B. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for  
the Ninth Circuit. Defendant's Exhibit "P." Re-  
ceived Aug. 19, 1913. F. D. Monckton, Clerk.

[Defendant's Exhibit "Q"—British Letters Patent  
No. 20,567, to John Mesny Tourtel, Patented  
September 20, 1902.]

2—390.

UNITED STATES OF AMERICA,  
DEPARTMENT OF THE INTERIOR,  
United States Patent Office.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true  
copy from the Bound Volumes of the Library of this  
Office of the Provisional Specification, Complete  
Specification and Drawings in the matter of the

British Letters Patent to  
John Mesny Tourtel,

Dated September 20, 1902,                      Number 20,567,  
for

Improvements in Phonographs.

IN TESTIMONY WHEREOF I have hereunto  
set my hand and caused the seal of the Patent Office  
to be affixed at the City of Washington, this 25th  
day of November, in the year of our Lord one thou-  
sand nine hundred and eleven, and of the Independ-  
ence of the United States of America the one hun-  
dred and thirty-sixth.

[Seal]

F. A. TENNANT,  
Assistant Commissioner of Patents.



*Date of Application, 20th Sept., 1902*

*Complete Specification Left, 18th June, 1903—Accepted, 20th Aug., 1903*

## PROVISIONAL SPECIFICATION.

### "Improvements in Phonographs"

I, JOHN MESNY TOURTEL of 146A Queen Victoria Street, London E.C. Consulting Engineer, do hereby declare the nature of this invention to be as follows:—

My invention relates to improvements in or relating to phonographs. These improvements are primarily devised to render more efficient and satisfactory that type of apparatus in which a horizontal cylinder revolved by suitable apparatus, forms the support for the hollow cylindrical record, and the horn rests upon the surface of the said record by means of a stylus attached to its small end, which stylus follows the helical line traced by the recording point upon the surface of the record cylinder and thus reproduces the sounds inscribed thereon.

My improvements in this apparatus relate to the following points of the construction.

#### THE COVER.

In place of the exposed cylinder and partially exposed driving mechanism hitherto employed, I have devised a cover so arranged that all the working parts of the mechanism are enclosed without hindrance to their satisfactory operation. My cover which is of any convenient shape and preferably of sheet metal, is attached to the base plate of the mechanism by means of a long pin or bolt passing vertically upwards and provided with a milled nut, which nut is screwed upon the threaded end of the bolt which passes through the hole in the top of the casing. Similar apertures at the sides enable the insertion of the key and of the check screw, which prevents the revolution of the driving shaft. The end of the casing surrounding one end of the revolving cylinder is open and the record can be slipped into its place or removed therefrom without disturbing the cover. The cover is moreover slotted at the top, above the record, the said slot being of sufficient width to allow for the travel of the stylus from one end to the other of the record. By means of this cover, the working parts are efficiently enclosed, and the appearance of the apparatus is greatly improved.

#### THE HORN.

The horn may be made of sonorous material in the well known manner. At the small end thereof, the stylus is cemented in or fastened to a plug fitted in the point of the said horn. I find that the preferable method of attachment is to cement the said stylus by means of a fabric and gelatine, or the like cement, to the material of which the horn is composed. But any other suitable cement may be employed whereby the stylus can be securely attached to the aforesaid plug, and this in turn intimately secured to the end of the horn. A further improvement relating to the horn consists in the means of supporting the same and imparting to it a sufficient pressure to cause the stylus to rest firmly upon the record. The horn itself being extremely light in proportion to its bulk, does not afford sufficient pressure by its weight alone. I therefore secure to the preferably metallic mouthpiece of the horn, a socket

[Price 8d.]



working in pivots and adapted to fit over a bent wire or the like support which is arranged to fit in a hollow socket formed by perforating one of the supporting feet of the base plate. The socket attached to the horn by its pivots is also attached to it by means of a spiral spring fixed in such a position that when the apparatus is in position with the socket upon the wire support and the stylus upon the record, the said spiral spring will be extended to the required degree to give the necessary downward pressure to the horn and thereby ensure the close contact of the stylus with the record. 5

#### THE STYLUS.

This portion of the invention is improved as follows. I provide a long stylus of suitable material. This stylus may be a solid one or it may be more conical in shape than that hitherto in use, and hollow internally. In either case, the length of the stylus is considerably increased over the ordinary construction, and the top of it is formed in the shape of a disc or ring, intimately attached to the diaphragm of the horn. 10 15

#### THE SUPPORTS

In my improved construction, I provide firstly a support for the point of the stylus when the apparatus is out of operation. By this means, I can without dismounting the machine or leaving the stylus resting upon the record, or without providing another support for the horn, place the instrument instantaneously out of operation and return it to the working position again, equally quickly. The support for the stylus, consists of a little cup or box of any convenient shape, preferably secured to the top of the cover at one end of the slot for the stylus, already described. The bottom of this cup or receptacle is formed of some soft material, such as soft rubber, and upon this the point of the stylus can rest without injury. The supports of the base plate are formed in the shape of legs, preferably cast in one piece with the said plate, and three in number. On one of these legs is a hollow socket provided with a milled ridge on the outside, and internally threaded to fit the threaded foot cast in one piece with the plate. This socket serves to adjust the level of the apparatus. The front foot is formed hollow and serves as the socket for the end of the bar or wire supporting the horn. The upper edge of this socket is preferably notched to receive the cross pin in said support thereby holding the same rigidly in one position. The third leg may be adjustable or not, as desired. 20 25 30 35

Although in the foregoing, I have set forth the construction as found preferable at the present time, I do not limit myself to the details therein set forth; thus for instance, I may have more than three supporting legs, or I may attach my cover otherwise than by the long bolt described, and other alterations of design may be made, which are within the capacity of an experienced mechanic. But such alterations of the detail of the apparatus will remain within the scope of my invention herein set forth. 40

Dated the 20th day of September 1902

W. P. THOMPSON & Co.,  
322, High Holborn, London, W.C  
Patent Agents. 45

#### COMPLETE SPECIFICATION.

#### "Improvements in Phonographs".

I, JOHN MESNY TOURTEL, of 146A Queen Victoria Street, London, E.C. Consulting Engineer, do hereby declare the nature of this invention and in what 50



*Tourtel's Improvements in Phonographs.*

manner the same is to be performed to be particularly described and ascertained in and by the following statement:—

My invention relates to improvements in or relating to phonographs. These improvements are primarily devised to render more efficient and satisfactory that type of apparatus in which a horizontal cylinder revolved by suitable apparatus, forms the support for the hollow cylindrical record, and the trumpet rests upon the surface of the said record by means of a stylus attached to its small end, which stylus follows the helical line traced by the recording point upon the surface of the record cylinder and thus reproduces the sounds inscribed thereon.

In order to make my invention more clear, I have illustrated it in the accompanying drawings in which

Figure 1 shews a side elevation of the apparatus in the operative position.

Figure 2 shews a plan view of the same.

Figure 3 shews an isometric view on a reduced scale of the cover.

Figure 4 illustrates a section of the trumpet on the line X—Y of Figure 1.

Figure 5 shews the stylus on an enlarged scale in section.

Figure 6 shews another construction of stylus, in section through the stylus and the resonator drum to which it is attached.

In these drawings, A indicates the base plate, B the detachable cover, C the cylindrical record, D the trumpet, E the trumpet support. The base plate A may be of cast metal and supports a mechanism for giving rotary motion to the cylinder 1, on which the cylindrical record C can be slipped; the aforesaid mechanism forming in itself no part of my invention, is not specifically illustrated in the drawings, it may be of any suitable or known type. The base plate A has preferably two rear legs and one front leg arranged as shewn in dotted lines in Figure 2. One of the rear legs 2 is an ordinary cast iron leg, The other one is preferably a threaded bolt and somewhat shorter than its corresponding leg, but covered with a hollow socket 3 provided with a milled ridge or other convenient means for readily revolving it, and threaded internally to screw upon the threaded leg 2. By this means, an easy adjustment for levelling the apparatus is provided. The front leg 4 is hollow and forms a socket for the trumpet support E. This trumpet support is preferably constructed (as shewn in Figure 1 of the drawings) with a little cross pin 5 adapted to engage in a corresponding notch in the top of the hollow socket 4, thereby holding the rod or wire E firmly in place. Over the upper end of the rod E the socket 6 is arranged to fit. This socket is attached to a rim 7 of the trumpet D by means of the pivots 8. The socket 6 is attached to the trumpet D by means of the spiral spring 9 for the purpose hereinafter described.

The novelty of the construction of the trumpet resides in the arrangement for strengthening the same by the reinforcement of its lower part in the manner especially illustrated in Figure 4. The material of the trumpet which may be conveniently celluloid, or any other sufficiently light and resonant material, is curved to join at the edges into the form required, said join being in the shape of a V-shaped ridge running the entire length of the trumpet from the lower edge of the rim to the junction with the stylus. By this construction, the need of any special strengthening bars or reinforcement of other materials is obviated.

The stylus shewn in Figure 1 and sectionally in Figure 5 is formed of a curved tube terminating in a point and fitting in a wooden plug in the apex of the trumpet. Another form of stylus is shewn in section in Figure 6. It is preferably of a hard material such as glass or metal. It is formed of greater length than the stylus hitherto in use. To diminish its weight and render it more sensitive, it is formed hollow and is attached to the drum 12 by means of the annular or disc-shaped head 11. The junction of the drum or resonator 12 to the trumpet D is preferably by means of a fabric soaked in gelatine, cement or glue, but any other suitable cement may be employed.

The cover B is so contrived that it can be removed from the apparatus or replaced without interfering with any of the working parts. Its general construction is illustrated in Figure 3.

The end of the cylinder 1 is arranged to project slightly through the circular aperture 13 leaving a convenient space for the manipulation of the cylindrical record which can then be inserted or exchanged without moving the cover. Above the record, there is provided the slot 14 which accords access to the surface of the record for the stylus. At one side of the cover is provided the receptacle 15 having a soft pad or plug of rubber or the like at the bottom thereof, and adapted to receive the point of the stylus when the instrument is out of operation. By means of this holder, the ordinary supporting fork and other more complicated devices are rendered unnecessary. The casing is formed preferably in one piece and is secured to the base plate A by means of a single bolt 16 having a threaded end and a milled nut 17 thereon. Other apertures are provided for the insertion of the winding key 18 on the one side, and of the check screw 20 on the other.

The general operation of the phonograph is well known and need not be here described.

The record having been placed in position upon the cylinder 1, the cover B being in place and the driving mechanism started, the stylus 10 is lifted out of its receptacle 15 and put in place through the slot 14 of the cover. In addition to the weight of the trumpet D, the stylus is further impelled against the surface of the record by the action of the spiral spring 9, according to the strength of which the stylus will be more or less pressed upon the revolving record. The sounds caused by the inscriptions on the record are thus transmitted through the resonator to the trumpet and given forth. The apparatus can be easily taken to pieces for packing or removal and as easily reinstated, the cover which entirely protects the moving parts being attached to the base by only one screw.

Having now particularly described and ascertained the nature of my said invention and in what manner the same is to be performed, I declare that what I claim is:—

1. In a phonograph: a casing covering the mechanism and record having an aperture corresponding to the end of the record through which the said record can be removed or replaced without disturbing the casing, substantially as set forth.

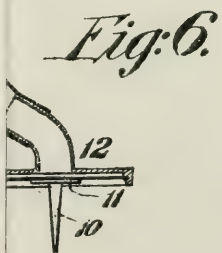
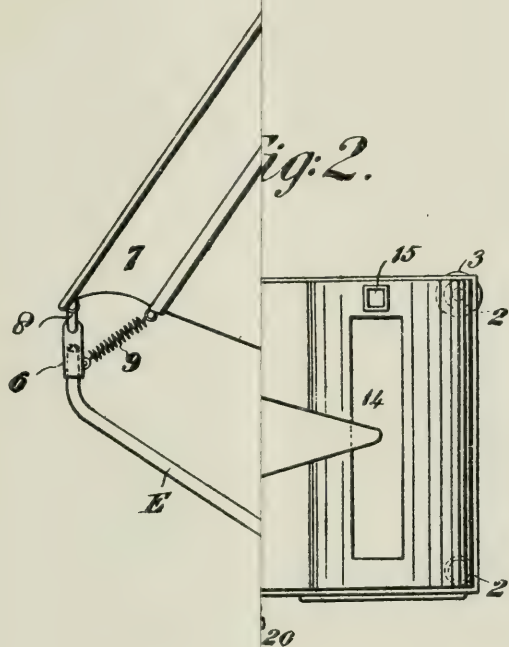
2. In a phonograph: a casing adapted to cover the mechanism and the record whilst allowing the record to be interchanged without disturbing the casing, said casing secured to the base of the mechanism by a single long bolt and provided with a pad or support for the stylus of the trumpet when out of contact with the record, substantially as set forth.

3. In a phonograph: the adjustable support E for the trumpet socketted in the hollow front leg of the base, substantially as set forth.

4. The combination and arrangement of parts forming the improved phonograph constructed and operating substantially as described and illustrated in the accompanying drawings.

Dated the 18th day of June, 1903.

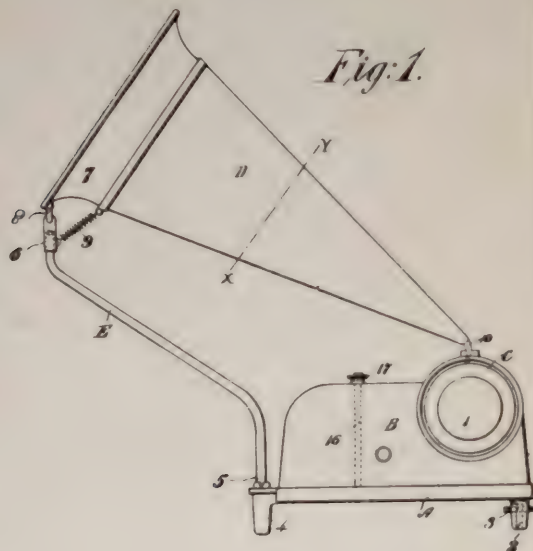
W. P. THOMPSON & Co.,  
322, High Holborn, London, W.C., and  
6 Lord Street, Liverpool.  
Patent Agents for the Applicant.



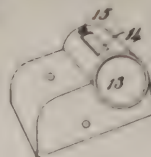
[This Drawing is a reproduction of the Original on a reduced scale]



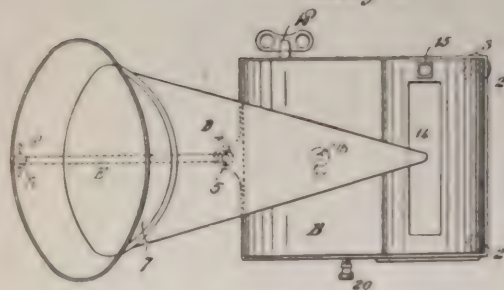
*Fig. 1.*



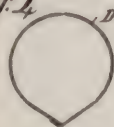
*Fig. 3.*



*Fig. 2.*



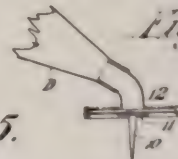
*Fig. 4.*



*Fig. 5.*



*Fig. 6.*









[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "Q." Oct. 2, '12. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "Q." Received Aug. 19, 1913. F. D. Monckton, Clerk.



[Defendant's Exhibit "R"—British Letters Patent  
No. 17,786, to Henry Fairbrother, Patented Au-  
gust 13, 1902.]

2—390.

UNITED STATES OF AMERICA,  
DEPARTMENT OF THE INTERIOR,

United States Patent Office.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true  
copy from the Bound Volumes of the Library of this  
Office of the Complete Specification and Drawings in  
the matter of the

British Letters Patent to

Henry Fairbrother,

Dated August 13, 1902,

Number 17,786,

for

Improvements in Phonographs and other Talking  
Machines.

IN TESTIMONY WHEREOF I have hereunto set  
my hand and caused the seal of the Patent Office to  
be affixed at the city of Washington, this 25th day  
of November, in the year of our Lord one thousand  
nine hundred and eleven, and of the Independence  
of the United States of America the one hundred and  
thirty-sixth.

[Seal]

F. A. TENNANT,

Assistant Commissioner of Patents.





*Date of Application, 13th Aug., 1902—Accepted, 25th Sept., 1902*

## COMPLETE SPECIFICATION.

### Improvements in Phonographs and other Talking Machines.

I, HENRY FAIRBROTHER of 49 Kestrel Avenue, Herne Hill London S.E. Metal Trades' Valuer, do hereby declare the nature of this invention and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement:—

- 5 My invention relates to that class of talking machine in which the reproduction of sound is produced by attaching a stylus to a trumpet, said trumpet being vibrated direct by the stylus from the record which carries the sound writing. The principal features of the invention are the method of attaching the said stylus to the trumpet, the material of which the trumpet is formed the formation of a  
10 longitudinal rib on the trumpet practically normal to the side thereof, the method of supporting the trumpet and of forming the joints therein and also the addition to the said trumpet of an internal tongue to increase the vibration.

- My trumpet may be of any suitable form but is preferably cone or funnel shaped and is provided with a flanged or bell shaped mouth. I form the trumpet  
15 chiefly or entirely of sonorous material such as gelatine, indurated fibre, celluloid, paper or the like and compose it of one or more sheets of the same. By preference I make it of two or three sheets and of different materials, said sheets being in the form of layers or folds which are stuck together by any suitable adhesive substance. For instance, I may use a sheet of gelatine or cellulose material, backed  
20 up with a sheet of fibrous material such as paper, or of a sheet of cellulose material and a sheet of gelatine material stuck together. The object in using more than one sheet is for cheapness of manufacture as well as to improve the tone, as a certain thickness is required to obtain good results. I therefore use a thin sheet of the more expensive material and get the required thickness of the trumpet by  
25 backing it up with cheaper material.

I employ several methods of forming the rib on the trumpet as well as several methods of attaching the stylus to the trumpet and also several methods of forming the trumpet from the sheet or sheets of material.

- I will now describe my invention with reference to the accompanying drawings  
30 in which:—

- Fig. 1 shows an elevation of a cone-shaped trumpet partly in section, provided with a bell mouth which trumpet is constructed mainly of gelatine, indurated fibre, celluloid, paper or any other suitable sonorous material. By preference I form it from one sheet of material with a lap joint or turnover seam, longi-  
35 tudinally and glued or cemented together.

- This trumpet is fitted at its smaller end with a plug of suitable material such as wood, the end of which, projects outside and in which a hole is cut to receive a stylus which is preferably made of glass. The wood plug is preferably formed with a saw cut or split in order to give it a springy grip of the stylus. The wood  
40 plug is extended inside the trumpet in the shape of a thin flat tongue wider at its outer end to conform to the shape of the trumpet, to the walls of which it may be fastened if desired. This tongue greatly improves the reproductions but is not essential. If desired a small piece of cloth, leather or rubber may be held between the tongue and the wall of the trumpet where it is fastened or in contact  
45 to still further improve the reproduction. The tongue is shown split as this further increases its usefulness and allows it to vibrate more freely with the walls

[Price 8d.]

of the trumpet. Instead of having a hole for the stylus, the plug may be provided with a point or pin over which a hollow stylus is fitted.

This drawing also shows one method which I adopt for supporting the trumpet from close under the bell shaped mouth.

Fig. 2. is a plan view of Fig. 1, the bell mouth and wide end of the trumpet not being shown. 9

Fig. 3 is a side elevation of another form of trumpet and shows a different method of attaching the stylus to the same. In this case a block of suitable material, such as wood, is inserted in the end of the trumpet and is centrally bored to receive the stylus which may be permanently or removably fixed therein 10 The drawing shows the stylus resting on a record of the usual cylindrical shape.

Fig. 4 shows a side elevation of a trumpet provided with a rib on its under side to which is attached the support of the trumpet and also a clip to hold the stylus.

Fig. 5 is an enlarged sectional view on the line *x* of the end of the trumpet and of the clip and stylus shown in Fig. 4. 15

Fig. 6 is a sectional view on the line *y* of the trumpet shown in Fig. 4 and

Fig. 7 is a sectional view on the line *z* of the trumpet shown in Fig. 4.

Fig. 8 shows a perspective view of a grooved block which I use by preference for the formation of the folded or pressed rib such as that shown in Fig. 6.

Fig. 9 is a sectional view of a part of the body of the trumpet and shows how 20 I arrange the various sheets, in this case three in number, forming the same so that their joints overlap and do not come directly underneath or next to each other.

Fig. 10 is a view similar to Fig. 9 showing two sheets only.

Fig. 11 is a side elevation of a complete phonograph or talking machine showing the relative position of the parts, the means I adopt of supporting the trumpet from its smaller end and the method of attaching the stylus to the rib at about half way up the same. 25

Fig. 12 is a sectional view of the rib of a trumpet, such for instance as that shown in Fig. 11 and shows a U shaped cap which is clamped over the rib to 30 strengthen it.

Fig. 13 is a plan view of the talking machine shown in Fig. 11.

Fig. 14 is a side elevation of a trumpet formed from one piece or strip of sonorous material which has been wound round a cone-shaped form to produce the desired shape, the edges of the said strip overlap each other so as to break joints. 35 A double thimble or cap like clip is fitted to the end of the trumpet and also carries the stylus. The larger end of the trumpet rests on a double or universal joint to give free lateral and vertical movement and is supported by a swing rod.

Fig. 15 is a front view of the larger end of the trumpet shown in Fig. 14 and more clearly shows the joint by which the trumpet has free lateral or vertical 40 movement.

Fig. 16 is a side elevation of a trumpet made from two strips of material which are wound round each other the joints overlapping so as to break the same. This trumpet is provided with a rib on its under side and is fitted with a cap at its smaller end to which the stylus is attached. 45

Fig. 17 is a section of the trumpet shown in Fig. 16 and shows a form of rib which is attached after the trumpet is made.

Fig. 18 represents a method of forming the trumpet with a rib which may be rivetted or cemented.

Fig. 19 is an end view of the same. 50

Referring to Figs. 1 and 2 *a* is the trumpet fitted with bell mouth *a'* and at its smaller end with plug *b*, to plug *b* is fitted or fixed the tongue *b'* which is split as shown and has rubber or other suitable material *c* at its ends. The other or outer end of the plug is formed in the shape of a ball and holds the stylus *s*, said ball being split or cut at *h* to improve the grip. 55

To the wider end of the trumpet is fitted a band *d* provided with lugs carrying joint *e* to which is attached an inverted bearing *g* for the bracket or swing rod *f*



*Fairbrother's Improvements in Phonographs and other Talking Machines.*

thus making a universal joint and giving free lateral and vertical movement to the trumpet.

Referring to Fig. 3. *a* is a trumpet of which the lower or narrower end only is shown, this end is fitted with plug *b* which is bored with a central hole *i* to which the stylus *s* is fitted. The stylus *s* is shown resting on the record *w*.

Referring to Figs. 4, 5, 6 and 7 *a* is the trumpet fitted with bell mouth *a*<sup>1</sup> and rib *k* the upper part of which, *k*<sup>1</sup> has been folded or turned back against the trumpet *a* to allow the bell shaped mouth *a*<sup>1</sup> to pass over it. To the lower end of rib *k* is fitted clip *l* made of any suitable material which carries the stylus *s*. The stylus is preferably removable being pushed into a slot *l*<sup>1</sup> in the clip *l*. The stylus rests on the record or sound writing by gravity or spring tension.

Referring to Fig. 8. The block *p* is grooved as shown at *p*<sup>1</sup>, this is used to hold the folded or turned edges forming the rib *k* when made until the adhesive substance used in them has become hard or set.

In Figs. 9 and 10. the separate layers of material *a*, *a*<sup>1</sup> and *a*<sup>2</sup> may be formed of different material, for instance *a* may be gelatine *a*<sup>1</sup> may be paper and *a*<sup>2</sup> may be of gelatine or any other suitable material. The ends or edges *j* of these separate materials do not lie directly over one another or in the same line.

Referring to Figs. 11 and 13, the trumpet *a* is formed with a joint or rib *k* shown in cross section in Fig. 12, which joint is covered with a U shaped cap *q* which fits closely over the rib and holds the joint securely. This trumpet is hung from the small end and the stylus *s* is attached to the rib at a point *l* some distance from the smaller end of the trumpet. The rod *o* is fastened to the trumpet at *o*<sup>1</sup> which is hinged at *o*<sup>2</sup> to allow a free vertical movement about *o*<sup>2</sup> as a centre, the vertical rod *o*<sup>3</sup> is also pivotted at *o*<sup>2</sup> and rests loosely in the standard *a*<sup>4</sup> so as to allow a free lateral movement about *o*<sup>4</sup> as a centre. This standard is fixed to the base of the machine. The stylus *s* rests in the record by gravity and traverses the spiral sound writing of the record as it rotates. The record *w* may be turned by a suitable handle such as *w*<sup>1</sup> or it may be turned by clockwork or other suitable means.

Referring to Figs. 14 and 15 *a* is the trumpet formed spirally from a strip of material. At the lower end of the trumpet is fitted the double cap or thimble *r* one end of which embraces the trumpet and the other holds the stylus *s*.

To the wider end of the trumpet is attached a plate *t* formed with a lug *v* to which is jointed an inverted bearing *g* in which the swing rod *o* is free to work.

Referring to Fig. 16 the trumpet is formed from two strips *a*<sup>1</sup> and *a*<sup>2</sup> of material wound one over the other so as to break joints, the rib *k* may be attached afterwards as shown at *k* in Fig. 17.

Figs. 18 and 19 show another form in which I may make my trumpet, in this case the edges of the material are turned out and rivetted together as shown at *v* and a clip *l* is attached thereto to hold the stylus *s*.

I do not confine myself to any particular form or shape of the plug or of the tongue and the trumpet may be round, oval or any other suitable cross section.

In any of the above trumpets a single sheet or a sheet composed of more than one sheet of different materials stuck together may be used.

Having now particularly described and ascertained the nature of my said invention and in what manner the same is to be performed I declare that what I claim is:—

1. A trumpet for phonographs or talking machines formed mainly of a sheet of sonorous material of a conical or pyramidal shape with a plug for attaching stylus fitted in its smaller end, said plug terminating in a vibratory tongue or plate, fitted to the inside of the trumpet, substantially as herein described and set forth.

2. A trumpet for phonographs or talking machines formed mainly of a sheet of sonorous material of conical or pyramidal shape with a plug for attaching stylus fitted in its smaller end, said plug terminating in a vibratory tongue or plate

fitted to the inside of the trumpet said tongue having a longitudinal slit to increase vibration, substantially as herein described and set forth.

3. A trumpet for phonographs or talking machines constructed mainly of a sheet of sonorous material and means for attaching the stylus by a plug in small end of trumpet with a hole in outer end of said plug for receiving the stylus, 5 substantially as herein described and set forth.

4. A trumpet for phonographs or talking machines constructed mainly of a sheet of sonorous material and means for attaching the stylus by a plug in small end of trumpet with hole in outer end of said plug for receiving the said stylus, said plug being slitted or cut as shown at Fig. 2 for the purpose of gripping said 10 stylus, substantially as herein described and set forth.

5. A trumpet for phonographs or talking machines constructed mainly of a sheet of sonorous material joined together by lap folded joints, cemented or glued and means for attaching stylus, thereto substantially as herein described and 15 set forth.

6. A trumpet for phonographs or talking machines fitted with a stylus said trumpet being formed of layers or sheets of different sonorous material stuck together substantially as herein described and set forth.

7. A trumpet for phonographs or talking machines fitted with a stylus, said trumpet being formed of one or more sheets of sonorous or resonant material with 20 a seam or longitudinal joint, such as described in various figures of drawings hereto annexed and substantially as herein of drawings hereto annexed and substantially as herein described and set forth.

8. A trumpet for phonographs or talking machines with a normal projecting rib and a stylus attached thereto, substantially as herein described and set forth. 25

9. The methods of attaching the stylus to the trumpet substantially as herein described.

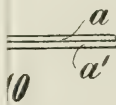
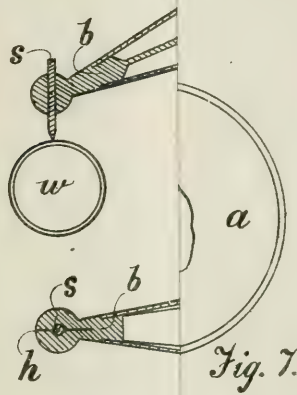
10. A trumpet formed by winding two layers of strip material, as shown in Fig. 15 herein and a stylus attached thereto substantially as herein described.

11. A trumpet formed by winding one strip of material with the edges overlapping into a cone or funnel shape substantially as herein described and as 30 shown in Fig. 14 of the annexed drawings.

Dated this 13th. day of August 1902

HY. FAIRBROTHER.

33 Cannon St London. E.C. 35



[This Drawing is a reproduction of the Original on a reduced scale.]



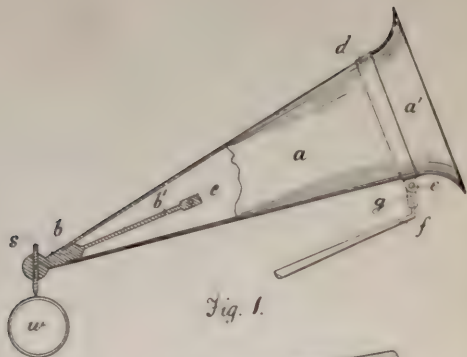
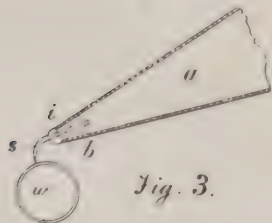


Fig. 1.



Fig. 2



*Fig. 3.*

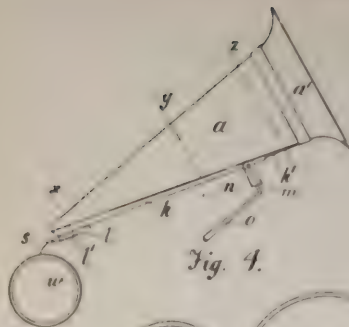


Fig. 4.



Fig. 5.

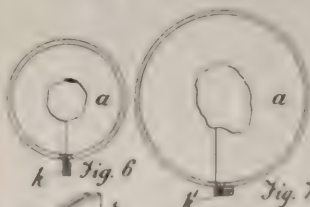


Fig. 6

Fig. 7.

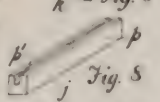
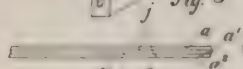


Fig. 5.



*Fig. 9.*

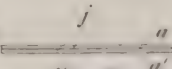


Fig. 10

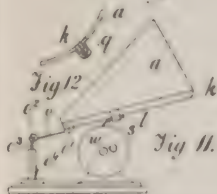
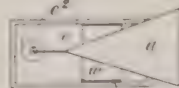


Fig 12

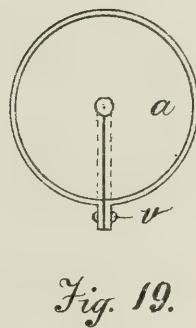
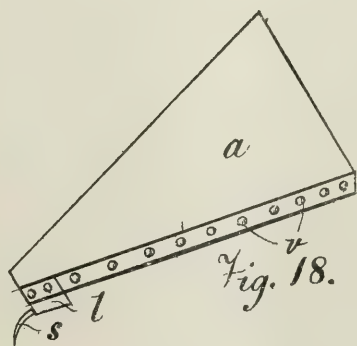
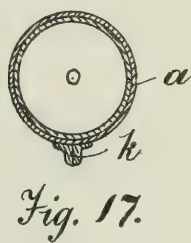
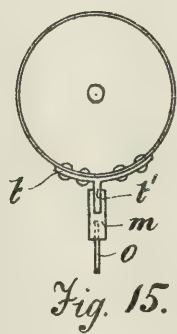
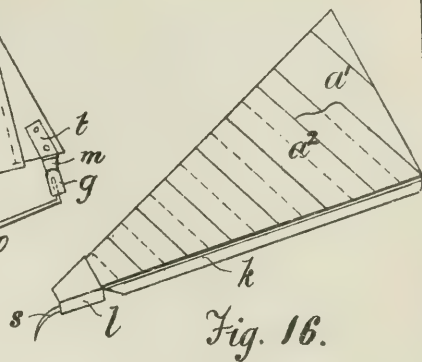
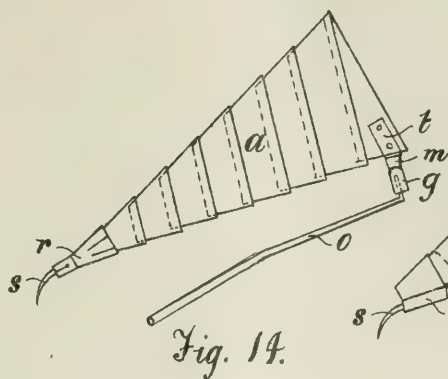
Fig 11.



*Fig. 13.*







[This Drawing is a reproduction of the Original on a reduced scale.]





[Endorsed]: No. 15,326. U. S. Dist. Court, Nor. Dist. of Cal. Dfts. Exhibit "R." Oct. 2, '12. W. B. M., Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "R." Received Aug. 19, 1913. F. D. Monekton, Clerk.

[Defendant's Exhibit "S"—Letters Patent No. 771,441, to Peter C. Nielsen, Patented October 4, 1904.]

2—390.

UNITED STATES OF AMERICA,  
DEPARTMENT OF THE INTERIOR,  
United States Patent Office.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this Office of the File Wrapper and Contents in the matter of the

Letters Patent of  
Peter C. Nielsen,

Number 771,441,                      Granted October 4, 1904,  
for

Improvement in Horns for Phonographs or Similar  
Machines.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 29th day of May, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

[Seal]

F. A. TENNANT,  
Assistant Commissioner of Patents.

2—437.

NUMBER (SERIES OF 1900).

203,080

1904

DIV. 23

(EX'R'S BOOK). 114

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9(04)

PATENT No. 771,441.

Name—Peter C. Nielsen

Of Greenpoint.

County of

State of New York.

Invention—Horn for Phonographs and Similar Machines.

Division of App., No. , filed , 190 PARTS OF APPLICATION FILED.	ORIGINAL.		RENEWED.
	Petition	Apr. 14, 1904	, 190
	Affidavit	“ “, 1904	, 190
	Specification	“ “, 1904	, 190
	Drawing	“ “, 1904	, 190
	Model or Specimen not reqd.	, 190	, 190
	First Fee Cash \$15.00	Apr. 14, 1904	, 190
	“ “ Cert.	, 190	, 190
	Appl. filed complete	Apr. 14, 1904	, 190

Examined—J. T. Newton,

Ex. Sept. 2, 1904 , 190

Countersigned—R. E. Grant, , 190

For Commissioner. For Commissioner.

9-3-04.

Notice of Allowance Sept. 3, 1904 , 190

Final Fee Cash \$20 Sept. 12, 1904 , 190

“ “ Cert. , 190 , 190

2

Patented October 4 , 1904



Attorney—EDGAR TATE & CO.,  
245 Broadway,  
New York City.

Associate Attorney—WM. N. CROMWELL,  
1003 F. St., N. W.,  
City.

Name	Serial Number
Patent No.	Date of Patent.
3	

No. 203080 No. 1/2  
filed  
Apl. 14/04.

\$15—RECEIVED

Apr. 14, 1904. ck

CHIEF CLERK, U. S. PATENT OFFICE.

245 Broadway, New York.

April 13, 1904.

Hon. Commissioner of Patents,  
Washington, D. C.

Sir:—

We beg to enclose herewith application of Peter C. Nielsen for Letters Patent for Horns for Phonographs and Similar Machines, together with check for \$15, the Government filing fee thereon.

Very respectfully,

EDGAR TATE & CO.

APPLICATION FOR LETTERS PATENT OF  
THE UNITED STATES.

MAIL ROOM.

No. 203080.

No. 1/2.

APR. 14, 1904.

Appl'n filed

U. S. PATENT OFFICE.

Apl. 14/04.

## PETITION.

To the Commissioner of Patents:

Your petitioner, PETER C. NIELSEN, a citizen of the United States and residing at Greenpoint in the County of Kings and State of New York and having a post-office address at 23 Drake Ave., Greenpoint, Brooklyn, N. Y., prays that Letters Patent may be granted to him for the improvements in HORNS FOR PHONOGRAPHS AND SIMILAR MACHINES set forth in the annexed specification; and he hereby appoints Edgar Tate and William W. Canfield of the firm of EDGAR TATE & CO., 245 Broadway, New York, or their accredited agent to act as his attorneys to prosecute this application, with power to make alterations and amendments therein, to sign the drawings, to receive the patent, and to transact all business in the Patent Office connected therewith.

PETER C. NIELSEN.

## SPECIFICATION.

To all whom it may Concern:

Be it known that I, PETER C. NIELSEN, a citizen of the United States ~~and~~ residing at Greenpoint in the County of Kings and State of New York have invented certain new and useful improvements in HORNS FOR PHONOGRAPHS ~~AND~~ SIMILAR  
OR

MACHINES of which the following is a specification, such as will enable those skilled in the art to which it appertains to make and use the same.

This invention relates to the horn of a phonograph or other machine of this class and the object thereof is to provide a horn for machines of this class which will do away with the mechanical, vibratory, and metallic sound usually produced in the *operation* such machines, and also produce a full, even and continuous volume of sound in which the articulation is clear, full and distinct.

The invention is fully disclosed in the following specification, of which the accompanying drawing forms a part, in which the separate parts of my improvement are designated by suitable reference characters in each of the views, and in which:—

Fig. 1 is a side view of my improved phonograph horn;

Fig. 2 an end view thereof;

Fig. 3 an enlarged section on the line 3-3 of Fig. 1; and

Fig. 4 a longitudinal section on the line 4-4 of Fig. 3.

In the practice of my invention, I provide a horn *a* provided at its smaller end with the usual nozzle piece *a2* by means of which connection is made with the machine, and in the form of construction shown a supplemental piece *a3* is employed between the larger or body portion of the horn and the nozzle piece *a2*, but the parts *a3* and *a2* may be formed integrally if desired, and may be constructed in any desired manner.

The main part *a* of the horn is bell-shaped in form and tapers outwardly gradually from the part *a3* to the larger or mouth end *a4*, and this curve or taper is greater or more abrupt adjacent to said larger or mouth end.

The body portion of the horn is also composed of a plurality of longitudinal strips *b* which are gradually tapered from one end to the other and which are connected longitudinally so as to form longitudinal ribs *b2*, each of the strips *b* being provided at its opposite edges with a flange *b3*, and these flanges, of the separate strips *b*, are connected to form the ribs *b2*.

The body portion of the horn, or the strips *b* are composed of sheet metal, and it will be observed that the inner wall of the body portion of said horn in cross section is made up of a plurality of short lines forming, substantially, a circle, and it is the construction of the body portion of the horn as hereinbefore described, that gives thereto the qualities which it is the objects of this invention to produce, which objects are the result of the formation of the horn, or the body portion thereof of longitudinal strips *b*, and providing the outer surface thereof with the longitudinal ribs *b2*, and curving the body portion of the horn in the manner described.

If desired, the part *a3* may be formed integrally with the body portion of the horn, in which event the ribs *b2* would extend to the nozzle or connecting portion *a2*, and it is the longitudinal ribs *b2* which contribute mostly to the successful operation of the horn, said rib serving to do away with the vibratory

character of horns of this class as usually made and doing away with the metallic sound produced in the operation thereof.

My improved horn may be used in connection with phonographs, or other machines of this class, and changes in and modifications of the construction described may be made without departing from the spirit of my invention or sacrificing its advantages.

Having fully described my invention, what I claim as new and desire to secure by Letters Patent, is:—

1. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally arranged strips of metal provided at their edges with longitudinal outwardly directed flanges whereby said strips are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally arranged ribs, substantially as shown and described.

2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally arranged strips of metal provided at their edges with longitudinal outwardly directed flanges whereby said strips are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally arranged ribs, said strips being tapered from one end of said horn to the other, substantially as shown and described.



8/26/04

~~3. A horn for phonographs and similar machines, said horn being tapered in the usual manner and the body thereof on the outer side thereof being provided with longitudinally arranged ribs, substantially as shown and described.~~

Insert A

IN TESTIMONY that I claim the foregoing as my invention I have signed my name in presence of the subscribing witnesses this 13th day of April, 1904.

PETER C. NIELSEN.

Witnesses:

F. A. STEWART.

C. J. KLEIN.

OATH.

STATE OF NEW YORK,  
COUNTY OF NEW YORK,—ss.

PETER C. NIELSEN the above named petitioner, being duly sworn, deposes and says that he is a citizen of the United States and resident of Greenpoint in the County of Kings and State of New York; that he verily believes himself to be the original, first and sole inventor of the improvements in HORNS FOR PHONOGRAPHS AND SIMILAR MACHINES described and claimed in the annexed specification; that he does not know and does not believe that the same was ever known or used prior to his invention thereof, or patented or described in any printed publication in the United States of America or any country foreign thereto before his invention thereof, or more than two years prior to this appli-



cation, or in public use or on sale in the United States for more than two years prior to this application; and that no application for a patent has been filed by him or his legal representatives or assigns in any country foreign to the United States.

PETER C. NIELSEN.

Sworn to and subscribed before me this 13th day of April, 1904.

[Notarial Seal]

W. W. CANFIELD,  
Notary Public.

2—260

Div. 23—Room 379.

Paper No, 1, Rejection.

Address only

All communications respecting this

"The Commissioner of Patents,  
Washington, D. C."

application should give the serial  
number, date of filing, and title of  
invention.

J. H. D.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

WASHINGTON, D. C., May 13, 1904.

MAILED

" " "

Peter C. Nielsen,

Care Edgar Tate & Co.,

#245 Broadway,

New York, N. Y.

Please find below a communication from the EX-AMINER in charge of your application for Horn for Phonographs & Similar Machines, filed April 14, 1904, Serial number 203,080.

F. I. ALLEN,

~~E. B. MOORE,~~

Commissioner of Patents.

Claim 3 of this application is rejected in view of Tourtel's Eng. Pat. #20,557 of 1902, Graphophones, and U. S. Patent of Fallows, Aug. 15, 1876, #181,159, Games and Toys, Toys, Sounding, it being held that it would not constitute patentable invention to provide a horn with longitudinal ribs, in view of the transverse ribs of Fallow's and the longitudinal rib of Tourtel.

J. T. NEWTON,

Ex.

J. H. L.

No. 2

Amdt. A.

MAIL ROOM.

C. 6/7/04.

JUN. 7, 1904.

U. S. PATENT OFFICE.

IN THE UNITED STATES PATENT OFFICE.

Room #379.

In re Application of Peter C. Nielsen, Horn for  
Phonographs and Similar Machines.

Filed April 14, 1904. Ser. #203,080.

To the Commissioner of Patents,

Sir:—

We desire to amend the above entitled case as follows:—

Add the following claim.

8/26/04

4. A horn for phonographs and similar machines, said horn being tapered in the usual manner and the body thereof on the outer side thereof being provided with longitudinally arranged ribs between which the longitudinal parts of the horn taper from one end to the other, substantially as shown and described.

Insert B

REMARKS.

This amendment is made in view of the Official communication of May 13. The references cited in this cases do not show a horn for talking machines having longitudinally arranged ribs on the outer side thereof. One of the references cited shows spirally arranged ribs, but this in no sense anticipates applicant's invention. This arrangement of the ribs would make the horn vibrate more and cause more of a metallic sound than if no ribs at all were formed on it. It is the longitudinally arranged ribs on the outer side of the horn which produce the result claimed by applicant, and favorable action is respectfully requested.

Respectfully submitted,

EDGAR TATE & CO.,

Attorneys for Applicant.

Dated New York, June 6, 1904.

2—260

Div. 23—Room 379.

Paper No. 3, Rej.

Address only

All communications respecting this

"The Commissioner of Patents,  
Washington, D. C."

application should give the serial  
number, date of filing, and title of  
invention.

J. H. D.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

WASHINGTON, D. C., June 22, 1904.

MAILED

“ “ “

Peter C. Nielsen,

Care Edgar Tate & Co.,

#245 Broadway,

New York, N. Y.

Please find below a communication from the EX-

AMINER in charge of your application for Horn for Phonographs and Similar Machines, filed April 14, 1904, serial number 203,080.

F. I. ALLEN,

~~E. B. MOORE,~~

Commissioner of Patents.

This action is in response to the amendment filed the 7th instant.

Claims 3 and 4 are rejected in view of the patent of Clayton, Oct. 18, 1898, #612,639 (181-25), the part "A" in said patent being considered the equivalent of applicant's horn as defined in claims 3 and 4 though said part "A" be more flaring than applicant's horn.

J. T. NEWTON,

Ex.

J. H. L.

No. 4.

MAIL ROOM.

Amdt. B.

JUN. 22, 1904.

6/22/04.

U. S. PATENT OFFICE.

IN THE UNITED STATES PATENT OFFICE.

Room 379.

In the Matter of the Application of Peter C. Nielsen,  
Horn for Phonographs and Similar Machines,  
Filed April 14, 1904. Ser. No. 203,080.

Hon. Commissioner of Patents,  
Washington, D. C.

Sir:—

We desire to amend the above-entitled case as follows:—

Add the following claim:—

5. A horn for phonographic and similar instruments, said  
horn being larger at one end than at the other and being composed  
of longitudinal tapered strips which are secured together at their  
edges, substantially as shown and described.

REMARKS.

This amendment is supplemental to that dated  
June 6th, 1904, and it is respectfully requested that  
said amendment be entered and the case considered  
in view thereof.

Respectfully submitted,  
EDGAR TATE & CO.,  
Attorneys for Applicant.

Dated New York, June 21, 1904.

No. 5

MAIL ROOM.

Amdt—C. K.

JUN. 29, 1904.

6/29/04

U. S. PATENT OFFICE.

IN THE UNITED STATES PATENT OFFICE.

Room #379.

In re Application of Peter C. Nielsen, Horn for  
Phonographs and Similar Instruments.

Filed April 14, 1904. Ser. No. 203,080.

To the Commissioner of Patents,

Sir:—

We desire to amend the above entitled case as  
follows:—

Add the following claim.

3 &. A horn for phonographs and similar instru-  
ments, said horn being larger at one end than at  
the other and tapered in the usual manner,  
C. said horn being composed of longitudinally



arranged strips secured together at their edges and the outer side thereof at the points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.

---

REMARKS.

This amendment is made in view of the Official communication of June 22nd. We have carefully considered Clayton the new reference cited and we do not see any similarity therein to applicant's device either in construction or operation. The object of applicant's construction is to destroy the vibratory character of a phonographic horn, and this cannot be done by corrugating the horn as all forms of corrugations increase the vibration instead of diminishing it. This fact ought to be apparent on its face and there is nothing in the references that meets claims 3 and 4 and favorable action thereon as well as on claims 6 presented herewith is requested.

Respectfully submitted,

EDGAR TATE & CO.,

Attorneys for Applicant.

Dated New York, June 28, 1904.



2—260

Div. 23—Room 379.

Paper No. 6. Rej.

Address only

All communications respecting this

“The Commissioner of Patents,  
Washington, D. C.”

application should give the serial  
number, date of filing, and title of  
invention.

J. H. D.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

WASHINGTON, D. C., July 21, 1904.

MAILED

“ “ “

Peter C. Nielsen,

Care Edgar Tate & Co.,

#245 Broadway,

New York, N. Y.

Please find below a communication from the EX-AMINER in charge of your application for Horn for Phonographs and Similar Machines, filed April 14, 1904, serial number 203,080.

F. I. ALLEN,

~~E. B. MOORE,~~

Commissioner of Patents.

This action is in response to the amendments filed the 22nd and 29th instants.

It is believed that it cannot constitute patentable invention to provide any horn with longitudinal stiffening ribs to render the horn perhaps less vibratory. Claims 3, 4 and 5 are held to be devoid of patentable novelty and invention in view of this holding and the prior art exhibited by the patents cited and the



2-260

Div. 23—Room 379.

Paper No. 8.

Address only

All communications respecting this

"The Commissioner of Patents,  
Washington, D. C."

application should give the serial  
number, date of filing, and title of  
invention.

M. E. P.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

WASHINGTON, D. C., August 5, 1904.

Peter C. Nielsen,

c/o Edgar Tate & Co.,  
New York City.

Mailed Aug. 5/04

Please find below a communication from the EX-  
AMINER in charge of your application, Serial No.  
203,080, filed April 14, 1904, for Horn for Phono-  
graphs and Similar Machines.

F. I. ALLEN,

~~E. B. MOORE,~~

Commissioner of Patents.

This action is responsive to letter filed the 27th  
ultimo.

Claims 3 and 4 are rejected in view of the holding  
that it cannot constitute patentable invention to  
provide any horn with longitudinal stiffening ribs  
to render the horn perhaps less vibratory. These  
claims and claim 5 are rejected also in view of the  
patents cited and the patent of Osten et al. referred  
to in the last action.

J. T. NEWTON,

Ex.

J. H. L.

104      *Pacific Phonograph Company vs.*

U. S. PATENT OFFICE.

RECEIVED.

AUG. 17, 1904.

DIVISION 23.

IN THE UNITED STATES PATENT OFFICE.

Room 379.

In the Matter of the Application of Peter C. Nielsen,  
Horn for Phonographs and Similar Machines,  
Filed April 14, 1904, Ser. No. 203,080.

Hon. Commissioner of Patents,  
Washington, D. C.

Sir:—

We hereby appoint William N. Cromwell, 1003 F  
Street, N. W., Washington, D. C., our associate at-  
torney in the above entitled case.

Respectfully submitted,

EDGAR TATE & CO.,

Attorneys for Applicant.

Dated New York, Aug. 16, 1904.

No. 10.

U. S. PATENT OFFICE.

Amdt.

RECEIVED

AUG. 26, 1904.

DIVISION 23.

IN THE UNITED STATES PATENT OFFICE.

In re Application of PETER C. NIELSEN, Horn  
for Phonographs, and Similar Machines.

Filed April 14, 1904, Serial No. 203,080.

Before the Examiner, Room 379.

HON. COMMISSIONER OF PATENTS,

Sir:—

The above-entitled application is hereby amended

as follows:—

Cancel claims 3, 4 and 5.

REMARKS.

The above amendment places this case in condition for allowance, and such action is respectfully requested at an early date.

Very respectfully,  
W. N. CROMWELL,  
Associate Attorney.

2—181.

A. R. Issue Division.

Serial No. 203,080.

All communications should be addressed to "The Commissioner of Patents, Washington, D. C."

DEPARTMENT OF THE INTERIOR,  
U. S. PATENT OFFICE,

Washington, D. C., Sept. 3, 1904.

Peter C. Nielsen,  
c/o W. N. Cromwell,  
City.

Sir:—Your APPLICATION for a patent for an IMPROVEMENT IN Horn for Phonographs and Similar Machines, Filed April 14, 1904, has been examined and ALLOWED.

The final fee, Twenty Dollars, must be paid, and the Letters Patent bear date as of a day not later than SIX MONTHS from the time of this present notice of allowance.

If the final fee is not paid within that period the patent will be withheld, and your only relief will be

If payment is made by check or draft, the credit allowed is subject to the collection of the same.

IN REMITTING THE FINAL FEE GIVE THE SERIAL NUMBER AT THE HEAD OF THIS NOTICE.



by a renewal of the application, with additional fees, under the provisions of Section 4897, Revised Statutes. The Office aims to deliver patents upon the day of their date, and on which their term begins to run; but to do this properly applicants will be expected to pay their final fees at least TWENTY DAYS prior to the conclusion of the six months allowed them by law. The printing, photolithographing, and engrossing of the several patent parts, preparatory to final signing and sealing, will consume the intervening time, and such work will not be done until after payment of the necessary fees.

When you send the final fee you will also send, **DISTINCTLY AND PLAINLY WRITTEN**, the name of the **INVENTOR** and **TITLE OF INVENTION AS ABOVE GIVEN**, **DATE OF ALLOWANCE** (which is the date of this circular), **DATE OF FILING**, and, if assigned, the **NAMES OF THE ASSIGNEES**.

If you desire to have the patent issue to **ASSIGNEES**, an assignment containing a **REQUEST** to that effect, together with the **FEE** for recording the same, must be filed in this Office on or before the date of payment of final fee.

After issue of the patent uncertified copies of the drawings and specifications may be purchased at the price of 5 cents each. The money should accompany the order. Postage stamps will not be received.

Respectfully,

F. I. ALLEN,

Commissioner of Patents.



After allowance, and prior to payment of the final fee, applicants should carefully scrutinize the description to see that their statements and language are correct, as mistakes not incurred through the fault of the office, and not affording legal grounds for reissues, will not be corrected after the delivery of the letters patent to the patentee or his agent.

245 Broadway, New York.

\$20 RECEIVED.

ck. SEP. 12, 1904. z

CHIEF CLERK, U. S. PATENT OFFICE.

Sept. 10, 1904.

Hon. Commissioner of Patents,  
Washington, D. C.

Sir:—

We beg to enclose herewith our check for \$20 final Government fee in the matter of the application of Peter C. Nielsen Phonograph Horn, filed April 14, 1904, Ser. No. 203,080, Allowed Sept. 3, 1904, and beg to request that the patent be duly issued.

Very respectfully,

EDGAR TATE & CO.

108      *Pacific Phonograph Company vs.*

C. E. R.

2—191.

ISSUE DIVISION.

Serial No. 203,080.

All communications should be addressed to "The Commissioner of Patents, Washington, D. C."

DEPARTMENT OF THE INTERIOR,  
UNITED STATES PATENT OFFICE,  
Washington, D. C., Sept. 12, 1904.

Peter C. Nielsen,  
c/o Edgar Tate & Co.,  
245 Broadway,  
New York, N. Y.

Sir:—

You are informed that the final fee of TWENTY DOLLARS has been received in your application for Improvement in

Horn for Phonographs and Similar Machines.

Very respectfully,

F. I. ALLEN,

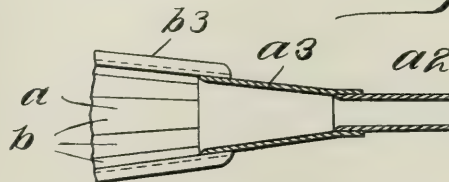
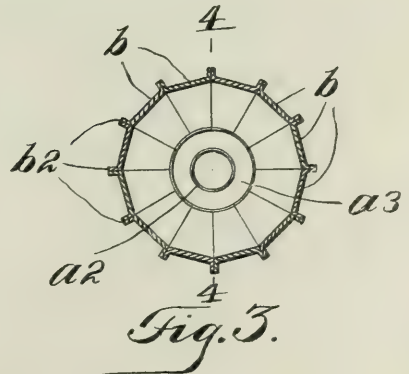
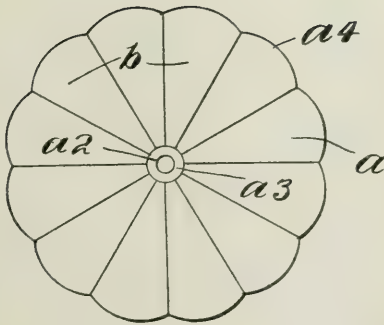
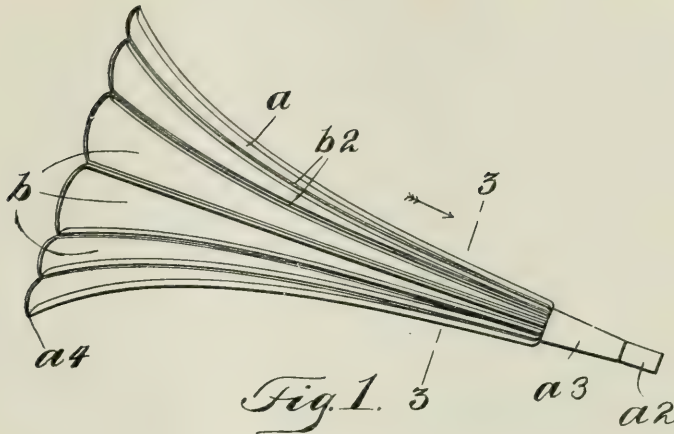
~~E. B. MOORE,~~

Commissioner of Patents.

P. C. NIELSEN.  
HORN FOR PHONOGRAPHS OR SIMILAR MACHINES.

APPLICATION FILED APR. 14, 1904.

NO MODEL.



WITNESSES

*W. B. Mattingly*  
*F. A. Stewart*

*Fig. 4.*

BY

INVENTOR  
*Peter C. Nielsen,*  
*Edgar & Pate & Co*  
ATTORNEYS



PETER C. NIELSEN, OF GREENPOINT, NEW YORK.

## HORN FOR PHONOGRAPHS OR SIMILAR MACHINES.

SPECIFICATION forming part of Letters Patent No. 771,441, dated October 4, 1904.

Application filed April 14, 1904. Serial No. 203,080. (No model.)

*To all whom it may concern:*

Be it known that I, PETER C. NIELSEN, a citizen of the United States, residing at Greenpoint, in the county of Kings and State of New York, have invented certain new and useful Improvements in Horns for Phonographs or Similar Machines, of which the following is a specification, such as will enable those skilled in the art to which it appertains to make and use the same.

This invention relates to the horn of a phonograph or other machine of this class; and the object thereof is to provide a horn for machines of this class which will do away with the mechanical, vibratory, and metallic sound usually produced in the operation of such machines, and also produce a full, even, and continuous volume of sound in which the articulation is clear, full, and distinct.

The invention is fully disclosed in the following specification, of which the accompanying drawings form a part, in which the separate parts of my improvement are designated by suitable reference characters in each of the views, and in which—

Figure 1 is a side view of my improved phonograph-horn; Fig. 2, an end view thereof; Fig. 3, an enlarged section on the line 3 3 of Fig. 1, and Fig. 4 a longitudinal section on the line 4 4 of Fig. 3.

In the practice of my invention I provide a horn *a*, provided at its smaller end with the usual nozzle-piece *a*<sup>1</sup>, by means of which connection is made with the machine, and in the form of construction shown a supplemental piece *a*<sup>2</sup> is employed between the larger or body portion of the horn and the nozzle-piece *a*<sup>1</sup>; but the parts *a*<sup>2</sup> and *a*<sup>1</sup> may be formed integrally, if desired, and may be constructed in any desired manner. The main part *a* of the horn is bell-shaped in form and tapers outwardly gradually from the part *a*<sup>3</sup> to the larger or mouth end *a*<sup>4</sup>, and this curve or taper is greater or more abrupt adjacent to said larger or mouth end. The body portion of the horn is also composed of a plurality of longitudinal strips *b*, which are gradually tapered from one end to the other, and which are connected longitudinally, so as to form longitudinal ribs *b*<sup>2</sup>, each of the strips *b* being provided at

its opposite edges with a flange *b*<sup>1</sup>, and these flanges of the separate strips *b* are connected to form the ribs *b*<sup>2</sup>. The body portion of the horn or the strips *b* are composed of sheet metal, and it will be observed that the inner wall of the body portion of said horn in cross-section is made up of a plurality of short lines forming substantially a circle; and it is the construction of the body portion of the horn as hereinbefore described that gives thereto the qualities which it is the objects of this invention to produce, which objects are the result of the formation of the horn or the body portion thereof of longitudinal strips *b* and providing the outer surface thereof with the longitudinal ribs *b*<sup>2</sup> and curving the body portion of the horn in the manner described. If desired, the part *a*<sup>2</sup> may be formed integrally with the body portion of the horn, in which event the ribs *b*<sup>2</sup> would extend to the nozzle or connecting portion *a*<sup>1</sup>, and it is the longitudinal ribs *b*<sup>2</sup> which contribute mostly to the successful operation of the horn, said ribs serving to do away with the vibratory character of horns of this class as usually made and doing away with the metallic sound produced in the operation thereof.

My improved horn may be used in connection with phonographs or other machines of this class, and changes in and modifications of the construction described may be made without departing from the spirit of my invention or sacrificing its advantages.

Having fully described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, substantially as shown and described.

2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips



are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, said strips being tapered from one end of said horn to the  
5 other, substantially as shown and described.

3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally-arranged strips secured together at  
10 their edges and the outer side thereof at the

points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.

In testimony that I claim the foregoing as  
15 my invention I have signed my name, in presence of the subscribing witnesses, this 13th day of April, 1904.

PETER C. NIELSEN.

Witnesses:

F. A. STEWART,  
C. J. KLEIN.



[In pencil]:

Acoustics

Megaphones.

1904.

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Print

- $\frac{1}{2}$  Application 1 papers.
1. Rej. May 13/04.
  2. Amdt. A. June 7/04.
  3. Rej. June 22/04.
  4. Amdt. B. June 22/04.
  5. Amdt. C. June 29/04.
  6. Rej. July 21/04.
  7. Argument July 27/04.
  8. Rej. Aug. 5/04.
  9. Asso-Power Aug. 17/04.
  10. Amdt. Aug. 26/04.
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  - 19.
  - 20.
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  - 22.
  - 23.

## TITLE:

Improvement in Horn for

or

Phonographs ~~and~~ Similar Machines.

[Endorsed]: No. 15326. U. S. Dist. Court, Nor.  
Dist. of Cal. Dfts. Exhibit "S." Oct. 2, '12. M.,  
Deputy Clerk.

No. 2306. U. S. Circuit Court of Appeals for  
the Ninth Circuit. Defendant's Exhibit "S." Re-  
ceived Aug. 19, 1913. F. D. Monckton, Clerk.

No. 2312

2

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IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

---

THE UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

---

On Writ of Error to the District Court of the  
United States For the District of Oregon.

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TRANSCRIPT OF RECORD.

RECEIVED

AUG 29 1913

F. D. MONCKTON,  
CLERK.

FILED

---

SEP 15 1913



No. 2313

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IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

---

THE UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

---

On Writ of Error to the District Court of the  
United States For the District of Oregon.

---

TRANSCRIPT OF RECORD.

---

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IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

---

THE UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

---

**Names and Addresses of Attorneys  
upon this Writ:**

---

**For the Plaintiff in Error:**

F. S. Senn,

Yeon Bldg., Portland, Ore.

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**For the Defendant in Error:**

Giltner & Sewall

Yeon Bldg., Portland, Ore.

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*In the District Court of the United States for the  
District of Oregon.*

Be It Remembered, That on the 17 day of April, 1912,  
there was duly filed in the District Court of the  
United States for the District of Oregon, a Tran-  
script on Removal, in words and figures as fol-  
lows, to wit:

[Complaint.]

*In the Circuit Court of the State of Oregon for the  
County of Multnomah.*

T. H. MOORE,

Plaintiff,

vs.

UNION.. BRIDGE.. & ..CONSTRUCTION.. COM-  
PANY, a corporation,

Defendant.

Plaintiff above named, for cause of action against  
the defendant above named, alleges:

I.

That the defendant now is and was during all the  
times herein mentioned a corporation duly incorpor-  
ated, organized and existing under and by virtue of  
the laws of the State of Missouri, and as such was  
and is doing business in the State of Oregon with its  
principal office in the City of Portland, Multnomah  
County, in said State.

II.

That during all the times herein mentioned, the  
said defendant was engaged in building a bridge

known as the Broadway Bridge, across the Willamette River in the City of Portland, in Multnomah County, Oregon, and the said plaintiff was employed by the said defendant to assist in the construction of said bridge and was so employed during all the times hereinafter mentioned.

### III.

That the said defendant, prior to the 2nd day of October, 1911, had constructed, and at all the times herein mentioned had possession of and was in control of, a staging at the east end of said bridge on the east bank of said river in said City, County and State, to be used by the employees of this defendant as a means of egress and ingress from and to the said bridge and bank of the river, for the purpose of carrying material from the land to the said bridge.

### IV.

That the said staging was constructed by defendant out of planks which had been used for cement forms and were incrustured with a white mixture which completely covered them and made them appear white to the eye of any one passing over the same; and through one of said planks, during all of said times, there was a sharp nail protruding, with the sharp end up, which said nail was also covered with said white mixture (and was in such board when said staging was built,) which made it impossible for any one to see or detect it in passing over the said staging on account of the fact that the said staging and said nail were of the same color.



## V.

That on or about the 2nd day of October, 1911, the superintendent and foreman of the said defendant ordered the said plaintiff, who was working on said bridge which was in the course of construction, to pass over the said staging and carry some lumber from the bank of the river to and upon said bridge; that pursuant to said order and while this plaintiff was obeying said order and was passing over the said staging for the purpose of carrying said lumber from said bank to said bridge, the said plaintiff stepped upon the said nail and it passed through the sole of his shoe on his left foot and penetrated his left foot, on account of which blood poison set in, in his said foot, and in order to save his life it became necessary to amputate his said foot and his said foot was amputated at the instep; that on account of said nail penetrating his said foot, and on account of said blood poison and said amputation, said plaintiff suffered and will suffer great physical and mental pain and has been permanently injured and has been incapacitated from working and will be incapacitated from working in the future, to his damage in the sum of \$35,000.00.

## VI.

That it was the duty of said defendant to furnish said plaintiff a safe place to work and to keep the same in a reasonably safe condition; also to carefully select and inspect and test all the wood or lumber used in the construction of said staging so as to detect any defects, and also to use every device, care and pre-

caution which it was practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of said staging, and without regard to the additional cost of suitable material.

#### VII.

The plaintiff further alleges that the said accident would not have happened if the defendant had furnished the plaintiff a safe place to work and kept the same in a reasonably safe condition, and had carefully selected, inspected and tested all the lumber used in the construction of said staging, and also if defendant had used every device, care and precaution which was practicable to use for the protection and safety of life and limb, which would not destroy the efficiency of said staging.

#### VIII.

Plaintiff alleges that in causing the said injury to plaintiff's foot, and in causing blood poisoning, amputation, suffering and damages as aforesaid, the defendant was then and there reckless, careless and negligent in the following particulars, to-wit: that the said defendant then and there failed to furnish a safe place to work, in furnishing the said staging for plaintiff to walk over, with a sharp nail protruding through the upper surface, which it was impossible to see when walking over said staging in the performance of his duties on account of the same being white and of the same color as said staging; also in failing to carefully select, inspect and test all the wood or lumber used in the construction of said staging so as to detect any

defects; and also in failing to use every device, care and precaution which it was practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of said staging, and in not using suitable material and free from nails.

IX.

That on and before the 2nd day of October, 1911, the plaintiff was a strong, healthy, active man, 46 years old, working as a common laborer and earning \$3.00 per day, and had steady employment, and had a life expectancy of 23.81 years. That by reason of said injury and acts of negligence of said defendant, the plaintiff is injured for life and is deprived of his livelihood as herein stated.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of \$35,000.00, and the costs and disbursements of this action.

GILTNER & SEWALL,

Attorneys for Plaintiff.

[Petition for Removal.]

*In the Circuit Court of the State of Oregon for the  
County of Multnomah.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

To the Honorable Circuit Court of the State of  
Oregon for Multnomah County.

Your petitioner, the Union Bridge and Construction Company, a corporation, organized and existing under and by virtue of the laws of the State of Missouri, respectfully shows to this Honorable Court, that it is the defendant in the above entitled action. That said action is of a civil nature and the matter in dispute in this action and cause exceeds the sum and value of Three thousand Dollars, exclusive of costs, to-wit: the sum of Thirty five thousand Dollars.

That the controversy herein is between citizens, inhabitants and residents of different states. That the said T. H. Moore plaintiff above named, was at the time of the commencement of this action and ever since has been and still is a citizen, resident and inhabitant of the State of Oregon, and your petitioner, the Union Bridge and Construction Company, was at the time of the commencement of said cause and action and ever since has been and still is a corporation organized and existing under and by virtue of the laws of the State of Missouri and is not a citizen, resident or inhabitant of the State of Oregon.

That your petitioner desires to remove this action before the trial thereof into the District Court of the United States for the District of Oregon, holden at Portland, Multnomah County, Oregon, and your petitioner offers herewith good and sufficient bond and surety for its entering into said District Court of the United States a copy of the record in this cause and action and for paying the costs that may be awarded by the said District Court of the United States, if said District Court shall hold or find that this action or

cause was wrongfully and improperly removed there-  
to and your petitioner herein prays that the said sur-  
ety and bond herein may be accepted and that the  
said action may be removed into the said District  
Court of the United States as aforesaid, pursuant to  
the statutes of the United States in such cases made  
and provided and that no further proceedings may be  
had herein in this Court and that your Honorable  
Court will make an order approving said bond and  
an order of removal of said action and to that end the  
defendant and your petitioner will ever pray.

RAUCH & SENN,  
Attorneys for Petitioner and Defendant.

**[Order of Removal.]**

*In the Circuit Court of the State of Oregon for the  
County of Multnomah.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

The defendant herein having within the time pro-  
vided by law filed its petition for the removal of this  
action to the District Court of the United States for  
the District of Oregon and having at the same time  
filed its bond in the sum of \$500 with good and suf-  
ficient surety pursuant to statute and conditioned ac-  
cording to law and notice to plaintiff of this applica-  
tion having been given and the defendant appearing



by its attorneys, Rauch & Senn.

NOW THEREFORE this Court does hereby accept and approve said bond and finding the facts set forth in said petition to be true does hereby order and decree that this action and cause be and the same is hereby removed into the District Court of the United States for the District of Oregon and that all other or further proceedings of this action or cause in this Court be and the same are hereby stayed and the Clerk of this Court is hereby directed to transmit forthwith to said District Court of the United States for the District of Oregon, a certified transcript of all the record herein.

Dated March 28, 1912.

J. P. KAVANAUGH,

Judge of the above entitled Court.

And afterwards, to wit, on the 22 day of April, 1912, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

[Answer.]

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

Comes now the defendant and for answer to plaintiff's complaint on file herein admits, denies and alleges as follows:



I.

Admits paragraph 1 of plaintiff's complaint and also paragraph 2 of said complaint but denies paragraphs 3, 4, 5, 6, and 7, and 8 and 9 of plaintiff's complaint and the whole thereof, except that defendant admits that plaintiff was in its employ on or about the 2nd day of October 1911.

For a first, separate and further answer and defense to plaintiff's complaint defendant alleges:

I.

That on or about the 2nd day of October 1911 and for a long time prior thereto plaintiff had been in its employ working on what is commonly known as the Broadway Bridge. That plaintiff was an experienced and capable employee and knew, understood and appreciated all the risk and danger of working in and about said bridge aforesaid, and at the time of the alleged accident and injuries complained of by plaintiff in his said complaint, plaintiff assumed all the risk and danger of his employment.

For a second, separate and further answer and defense to plaintiff's complaint defendant alleges:

That on or about the 2nd day of October 1911 and for a long time prior thereto plaintiff had been working for this defendant on what is commonly known as the "Broadway Bridge" in the City of Portland. That working with and about plaintiff were numerous other fellow servants and fellow employees of this plaintiff. That if said accident and injuries were due to the carelessness or negligence of any one other than this plaintiff it was due to the carelessness and negligence

of said fellow servants and fellow employees of this plaintiff for which this defendant is not responsible.

For a third separate and further answer and defense to plaintiff's complaint defendant alleges:

I.

That plaintiff was in its employ on the 2nd day of October 1911 and for a long time prior thereto had been in its employ and was a capable and competent workman and fully understood and appreciated all the risks and hazards of his employment. That said 2nd day of October 1911 plaintiff while performing his duties carelessly and negligently and without paying any heed or attention to what he was doing or where he was stepping and fully knowing that the lumber on which he was stepping had been part of a concrete form and that same had nails in it, stepped on a certain plank which had a nail in it, and which plank was then and there lying on the river bank. That said accident and injuries resulted wholly from plaintiff's own carelessness and negligence and was not the result of the carelessness or negligence of this defendant and so far as this defendant is concerned said accident was wholly accidental, unavoidable and could not have been foreseen by the exercise of ordinary care.

WHEREFORE defendant prays that the complaint on file herein be dismissed and that it have judgment for its costs and disbursements herein.

RAUCH & SENN,  
Attorneys for Defendant.

[Endorsed]: Filed April 22, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of April, 1912,  
there was duly filed in said Court, a Reply in  
words and figures as follows, to wit:

[Reply.]

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

Comes now the plaintiff and for reply to the an-  
swer of the defendants on file herein denies each and  
every allegation contained therein and the whole  
thereof.

Wherefore, plaintiff prays judgment as demanded  
in his complaint.

GILTNER & SEWEL,  
Attorneys for Plaintiff.

[Endorsed]: Filed April 22, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on Wednesday, the 16 day of April, 1913, the same being the 39 Judicial day of the Regular March 1913 Term of said Court; Present: the Honorable CHAS. E. WILVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Judgment.]**

*In the District Court of the United States for the  
District of Oregon.*

No. 5568.

T. H. MOORE,

v.

UNION BRIDGE & CONSTRUCTION CO.

This cause came on regularly at this time, pursuant to continuance; jury and attorneys for respective parties present as heretofore; whereupon the jury having agreed return into court their verdict as follows: "We, the jury in the above entitled action, find in favor of the plaintiff and against the defendant, and assess his damages in the sum of \$9000.00. E. A. McPherson, Foreman."

Whereupon, it is Considered, Ordered and Adjudged that the said plaintiff T. H. Moore, have and recover of and from the defendant Union Bridge and Construction Company the sum of Nine Thousand Dollars (\$9000.00) together with his costs and disbursements taxed herein at \$104.55 it is further ordered that execution may issue herein.

**[Bill of Exceptions.]**

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

BE IT REMEMBERED that the above entitled cause came on for hearing in the District Court of the United States for the District of Oregon on April 17th, 1913, before the Honorable CHARLES E. WOLVERTON, District Judge, plaintiff appearing in person and by his attorney R. R. Giltner of Giltner & Sewall and defendant appearing by F. S. Senn its attorney and a jury having been duly impaneled, the following proceedings were had being all the proceedings had therein, and the following being all the testimony taken including the instructions of the Court and every and all matters and things pertaining to the trial of said case all of which is made a part of the record in this case and all of which is referred to hereby and made a part hereof.

That after the introduction of all the testimony by both the plaintiff and the defendant the following motion and proceedings were had:

“Mr. SENN: Your Honor, at this time I want to make a motion for a directed verdict, on the following grounds:



First, that there is not sufficient testimony or evidence of negligence to be submitted to the jury.

Second, that the evidence shows that this was not a staging or a platform of any permanent nature, and the testimony shows that there were three or four or five planks thrown side by side—so Mr. Moore testified; that they were not spiked nor nailed down; that they were two or three inches apart, and were lying there loose; that the planks were about twelve feet long, and that they were thrown on a log that projected out from the bank; that that testimony, your Honor, does not make out an appliance or a place or sidewalk, or staging, or platform such as this company would be responsible for. That was Mr. Moore's testimony, and was the only testimony in this case as to what was there from his standpoint. Now your Honor, to say that, when you put two or three or four planks side by side—even admitting his testimony for the sake of the argument that that constitutes a staging or platform without being bolted down or spiked down, or nailed, and they were of that form lumber that was lying all around there—that that would constitute a staging, or platform or appliances that was furnished by the employer or the master, it seems to me would be going a long way. Not only that, but if there is any testimony here at all of who did this, it was the work of fellow servants, if anybody put that there, it was some men who simply threw the boards together there, and walked out and for the negligence of the fellow-servant the company would not be responsible.



Third. That it was one of those risks which he assumed, because at the time of the accident, your Honor, they were engaged in cleaning up, breaking down and taking away the debris, and they were cleaning that stuff up; and where men are engaged in cleaning up, and preparing, and breaking down, there is no law as to a provision of a safe place, and certainly there is no rule providing that safe scaffolding shall be used or made, because at that time they are engaged in the very work of tearing that down. And furthermore, the company had provided a float for him to go upon—a safe place, where they have always gone, where he could have gone, and where he is supposed to have gone—and whenever he took any other way, and was injured by his own negligence, the company was not responsible.

COURT: I will overrule the motion.

Mr. SENN: Save an exception."

That after said motion was made and argued, the Court overruled the same. An exception was duly and regularly allowed by the Court.

That afterwards, to-wit, on or about the 25th day of April, 1913, a motion for a new trial was made, which motion is in the following terms, to-wit:

"Comes now the defendant in the above entitled cause and moves the Court for a new trial and for an order setting aside the verdict and judgment in the above entitled cause on the following grounds, to-wit:

First: Excessive damages appearing to have been given under the influence of prejudice and passion.

Second: Error in law occurring at the trial and

excepted to by the party making this motion, and in support of said motion the defendant herein presents the testimony taken at the time of said trial, and the whole thereof, and presents its authorities and brief."

That said motion was duly argued and overruled, to which action of the Court, an exception was duly taken and allowed.

That said bill of exceptions was duly prepared and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as and for the bill of exceptions in the above entitled cause and the same is hereby ordered to be a part of the record in said action.

In Witness Whereof, I have hereunto set my hand and seal this 4th day of June, 1913.

CHAS. E. WOLVERTON,  
Judge.

C. H. WHEELER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination.

Questions by Mr. GILTNER:

Please state your name and occupation.

A. C. H. Wheeler; physician and surgeon. At the present time I am Health Officer for the City of Portland.

Q. Doctor, are you duly licensed to practice your profession in the State of Oregon?

A. I am.

Q. How long have you been practising in the

State of Oregon, Doctor?

A. In the State of Oregon about 33 years—maybe a little more, maybe less. I would have to look up records to find the exact date, but it is about that time.

Q. Are you acquainted with the plaintiff, T. H. Moore?

A. Yes, sir.

Q. Were you acquainted with the Union Bridge & Construction Company, the defendant in this case?

A. Yes.

Q. State if you had any business relations with them during the time that they were constructing the piers in the Broadway Bridge.

A. Yes, I was their surgeon to take care of the injured or sick connected with the bridge work or the coffer dam work or the excavating work—in fact, any employe of the Bridge Company.

Q. State if you, on or about the 2nd day of October, 1911, or thereabouts, met the plaintiff, T. H. Moore.

A. Yes.

Q. And state, now, what you found, if you examined him, and what you found, and if you attended him for anything or any injury to his foot.

A. About that date. Of course I do not know the dates at the present time from memory. Presumably that is the date. I first met Mr. Moore at the St. Vincent's Hospital. He was sent out there by my assistant, Dr. Glenn Wheeler, after having examined him in his office. He sent him to the St. Vincent's

Hospital. And I found him with a puncture wound in the sole of the foot, with the foot very much inflamed; blisters and blood upon the top of the foot and on the bottom of the foot and upon the leg, showing the acute septic affection of the wound; and the infection of the wound was the result of the affection.

Q. Doctor, I wish you would state to the jury now what you did to him, and how you attended to his foot, and the condition of the foot up to the time you operated on him.

A. The infection was so acute, so active, that a surgical operation was impossible. It was not impossible, but the results would be disastrous if I had amputated his foot at that time. I put it in what we call a hot bath—that was, I got a large vessel and filled it with water and in that water we had an antiseptic solution, and in this we put his leg and foot, down into it and up to his knee, and then covered the knee with the hot water and kept that hot for long periods of time. I think in this instance at one time he was there constantly for 24 hours without any cessation, in this bath. The idea, of course, was to arrest the septic affection, which seemed to be extending higher. And at that time it looked like a surgical operation would be necessary to save his life, and we would have to amputate the leg here. But I kept persisting with the hot baths and with the result that what we term a line of demarcation set up. That line of demarcation is simply this, that nature begins to amputate on her own account. That is, that portion of the foot would die, and then it would form a marked line here of dead

portion there which would be black, and the rest of the foot would become more healthy above. The infection disappeared from here, and this line of demarcation was formed across the top of his foot; so when that began to form that way then I felt at ease. I should amputate it down here and save him as much foot as possible. The object of this was to save all the limb that you can. In this instance I amputated across here. The portion of his side foot here and the little toe was yet alive and healthy, so I saved that, brought that around and made a flap to save him this portion of the foot, and up through here and down there, so he could walk on the natural extremity of the foot; that is, the portion that was left.

Q. How long was it from the time you first saw him, Doctor, until you had performed the operation?

A. I could not answer that exactly because I have not the dates; but it must have been probably three weeks, fully three weeks, I should say, from the time I first saw him until he got it in such condition that I could amputate down lower. As he was getting better of course I kept trying for more foot, for more space, for more extent. And as it would get better here that would save me, it would get better so I could amputate here. Then it finally got to this point where I could amputate at this point and save him all the leg I possibly could. It must have been three weeks.

Q. You did better than you thought you could under the circumstances, Doctor?

A. Oh, yes; yes, yes, yes.



Q. Now, I will ask you, Doctor, if he suffered any pain.

A. Oh, yes; excruciating pain.

Q. What is that?

A. Excruciating pain. The pain was very severe at the beginning, intensely severe. The man suffered necessarily from the swelling and congestion.

Q. What in your opinion was the cause of this pain and swelling?

A. It was the infection from the wound in the bottom of his foot. That wound apparently was a wound from the nail, a nail wound, a sharp punctured wound. It was a sharp, deep punctured wound.

Q. Is that what you call blood poisoning?

A. Yes, that is what we term blood poison—septic, really it is septic infection localized to the leg. Blood poisoning generally is understood to mean a general infection of the whole system. In this instance it was—while the system sympathized with the amount of the infection here, the infection was localized to this one limb. The other portions of his body, of course, were exempt from any affection other than the general toxic infection from this condition. It was not so very great.

Q. How long did you treat him after that, Doctor?

A. Well, he was under my observation as long as he was in the hospital. I would see him—of course, while he was in this condition I had to see him every day, sometimes twice a day.

Q. After he came out from the hospital, then you looked after him?



A. No. After he came out from the hospital I have not had anything to do with his foot since then. And while he was in the hospital after the foot began to get well, then I didn't see him so often, every two or three days, you know. It was not necessary—the nurses could take care of it. I would look at it occasionally as often as I thought it was necessary; or if they thought it was necessary they would call my attention to it. But that lasted over a long period of time. Now that time—of course I don't know the length of time without consulting the hospital records.

Q. What would be the reasonable value of your services in a case of that kind, Doctor?

Mr. SENN: There is no claim here made for doctor's services.

Mr. GILTNER: Isn't there a claim made in there for doctors?

A. No, I think not.

Mr. GILTNER: No, that is right.

Cross Examination.

Questions by Mr. SENN:

He stayed in the hospital a good while longer than was necessary, didn't he, Doctor?

Mr. GILTNER: I object to that. Oh, excuse me.

A. Well, he remained in the hospital longer than was necessary so far as the treatment was concerned. So far as the treatment of the leg was concerned.

Q. You saved the heel of the foot, if I understand you correctly?

A. Yes.

Q. It was cut through the instep?

A. Yes, about through the instep here.

Q. Then he has a good part of the foot left?

A. He has this portion from here of the foot.

Q. Is that a good serviceable portion?

A. It is a serviceable portion, but not a good serviceable portion.

Q. Not as good as the whole, of course not. They have artificial shoes now that they place on there, on an injury of that kind, Doctor?

A. I am afraid that I did not leave him a foot that an artificial shoe could be fitted to. I am afraid that would be impossible on account of the attachment. My conception of that was that he could have a steel shank put in here the whole length of the shoe from the heel down here and extend down on the sole, and give him spring from that in lieu of the spring that I have taken off by amputating this portion of his foot. But I don't think he ever followed that out. And I don't know whether it would be successful or not. And I don't believe you can put an artificial foot on there. Where we have an artificial foot we amputate here. And I thought of amputating there, and let him then put on an artificial foot. But I desired to save as much leg as possible, was my reason, figuring he could walk better on this stump than on an artificial leg.

Q. After the accident did he make any statement to you as to how it happened?

Mr. GILTNER: I object to that, if the Court

please; not proper cross examination.

COURT: That is not cross examination.

Mr. SENN: Well, then, we will recall him when our case comes. That is all, Doctor.

Excused.

T. H. MOORE, called as a witness in his own behalf, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. GILTNER:

Please state your name, age, residence and occupation.

A. T. H. Moore; age, 46; living in Portland; occupation, laborer.

Q. Are you the plaintiff in this action?

A. Yes, sir.

Q. State the condition of your health on and before the 2nd day of October, 1911.

A. My health was good.

Q. Whom were you working for?

A. Working for the Union Bridge & Construction Company.

Q. The defendant in this action?

A. Yes, sir.

Q. How much were you being paid a day?

A. I was getting \$3.00 a day.

Q. Were you having steady employment?

A. Yes, sir.

Q. I wish you would state, now, under whom you were working. Who was the superintendent over you?

A. Mr. Dawson was superintendent at the time.

Q. State if on or about that time you received any instructions from Mr. Dawson.

A. I did.

Q. State what they were.

A. Mr. Dawson instructed me to go over on the East pier with Mr. Chalfan.

Q. Who was Mr. Chalfan?

A. Mr. Chalfan was acting as foreman for the Union Bridge Company. He instructed me to go over to Mr. Chalfan on the East pier and help get those pipes out, which I did.

Q. What position did Mr. Chalfan have over you?

A. He was a foreman, acting as foreman over me.

Q. Did you take orders from him?

A. Yes, sir.

Q. Where were you when you received this instruction?

A. I was right on the front part of the Albers Bros. docks, close to their office.

Q. How did you get over there? How did you get over to the pier?

A. From the office to the pier, we went over in a boat. They took us over in a boat. We was on the West side.

Q. I wish you would state if you ever had worked on this pier before this time.

A. No, sir.

Q. I wish you would look at this model here and state who made that.

A. I made that model, and made it as near to rep-

resent the East pier of the Broadway Bridge as I possibly could. We were sent over there to take those pipes out. Those pipes, joints, probably 8 or 10 feet long, they joint together, are bolted together, and this here coffer dam was filled more than level full with gravel. And we were shovelling this gravel away and getting down to where these pipes were jointed so as to get the taps and bolts out to take off this top joint. While we were working there that way shovelling up gravel out of there, some little water gathered in around the pipes. I was up here shovelling gravel back. Mr. Wylie was up here.

Q. Wylie who?

A. Mr. Chalfan, the foreman.

COURT: Is the name Chalfan?

A. Yes, sir. I was standing here shovelling back. He says, "Tom, go across there and get some of those plank on the bank of the river and bring here and lay across here, and you won't need to get down in the water. You can reach down through and take the tap off and take the bolts off without getting into the water so much." I went across here and got the plank and brought it back, and he showed me where to lay it right across that way. I started back to get the second plank and stepped off this coffer dam on this staging. I stepped on a wire nail, sharp wire nail. It penetrated through my shoe and into my foot. And I pulled my foot off that nail and turned it up this way to see if there was any blood came out, as it was hurting me, and my foot was, my shoe was covered with concrete. These boards had been used



in the concrete form and had lots of concrete on.

Q. What was the color of the boards?

A. They was a light gray, such as concrete would make a board.

Q. What was the color of the nail?

A. Well, the nail would be about the same color. As I pulled my foot off the nail and stepped back on the coffer dam, I went right across it here and told Mr. Wylie—

Q. Mr. Wylie?

A. Mr. Chalfan.

Q. Call him by his last name.

A. All right. Mr. Chalfan was right here. I told him I had run a nail in my foot. He says, "Very bad?" I says, "Very bad, the way it hurts me." He says, "You better come up and go over to the office, and have something done for it." Right here I got into the boat and went across on the West side to the Albers docks, and we got out of the boat there and went up on to the docks.

Q. Now, before you go any further, I desire to question you in regard to this model. I wish you would state the length of this coffer dam.

A. Well, the length of the coffer dam I could not tell you the exact length of it. It is between 60 and 70 feet, the length of it this way. This way was something like 30 feet across this way.

Q. 30 feet wide?

A. No, 15 feet wide across this way, and something like 60 feet this way. About 15 feet across this way, I presume. I have not got the exact—



Q. Now, I wish you would state what those nails represent that are in the model of the coffer dam.

A. Those nails represents pipes that runs down through the pier down to the bottom in order to take out sticks, stones or anything that they could not blow out by the compressed air. With a bucket they brought it up through those pipes and we emptied it outside.

Q. Now, I wish you would state about what was the diameter of those pipes.

A. Well, I presume about 16 inches in diameter.

Q. What was the condition of the piers at the time that you went over there, as to having any cement forms on them or not?

A. Those were all stripped down. This was the lumber that was piled over here, had been the forms of those corner piers that came up here.

Q. About how high were these piers?

A. Well, something like 18 feet, 18 or 20 feet. I don't know the exact height of them.

Q. State whether they were the same size all the way up.

A. No, sir. They were a little bit smaller at the top. They were larger at the bottom and ran kind of sloping towards the top.

Q. Now, what composed this coffer-dam that we speak of here. Tell what composed that.

A. That coffer-dam was made out of timber 12x12 placed right flat on one another and spiked together with drift pins—holes bored through and drifted together.

Q. I wish you would state if there was a float around there and where that float was located, and how it was connected, if at all, up to this coffer dam or this pier.

A. There was a float at the north end of the pier. It was used for men going from the East to the West side and the West to the East side in a boat, to get off here and go up to the railroad, where we would go either way if we had work, North and South, both ways. This float was used for getting off—the men who were going off work and coming to work get in the boat and get out of the boat here and go up to the railroad. It was not connected with this pier at all whatever. It was at least from 4 to 6 feet from the North end of the pier.

Q. What was the distance from the East plank of the coffer-dam to the bank of the river?

A. Well, something like between 5 and 7 feet. I would not say exactly because I didn't measure it. It was something near 5 or 7 feet between the coffer-dam here and the bank, to the bank.

Q. State, now, how this staging was built.

A. Well, the staging was, the North end was braced on a piece of timber, with this lumber back here laid on the back end of it. I could not say whether it was projecting out of the bank or not; but I know there was a piece of timber under there, and at the south end there was some gravel in there and some stones filled in that those boards was placed on. There might have been a board underneath the staging on top of those stones—I could not say as to that.

I did not see that.

Q. State how far below the top of the coffer dam the staging was.

A. Something like about 8 or 10 inches.

Q. Then in stepping from the coffer-dam on to the staging you had to step down about 8 or 10 inches?

A. Yes, sir, something just like a step. You step right down on to the staging.

COURT: Do I understand the staging ran square up to the coffer-dam?

A. Not up against it.

COURT: What was the space between?

A. Well, something like a foot—a foot and a half.

Q. Now, what was the stage of the water there at that time?

A. The water was very low at that time. It was very low water at that time.

Q. How near did it come to the top of the top part of the frame of the coffer-dam on the West side of the coffer-dam where you got into the boat?

A. Well, about 8 inches, I presume, to the top of the coffer-dam.

Q. What was the size of these boards that composed the coffer-dam which ran lengthways, lengthways of the coffer-dam?

A. Which boards do you mean?

Q. Well, these boards up here. Can you see or not? I mean these boards that composed the sides of the coffer-dam here, running North and South.

A. Well, this was 12x12 stuff. 12x12. These

were all—the coffer-dam was all made of 12x12 timber, up until it came here, and from here on up it was made of 2 inch stuff, 2x8 or 2x6.

Q. State whether there was any flat, any boat or scow on the West side of the coffer-dam at that time.

A. There was not that morning when I was there.

Q. Now, I wish you would state about how far from the edge of the river, the water, it was to where these cement planks were piled up on the bank of the river.

A. Well, from the edge of the staging to the bank of the river to where the plank was piled was not over a foot and a half or two feet from the bank of the river.

Q. Now, Mr. Moore, I wish you would tell the jury or give them an idea as to how the bank from the railroad track sloped down to the bank of the river, to the water's edge.

A. Well, the bank along there is quite steep. It ran down quite steep. Of course it was not as smooth as this is. It was quite steep, ran down here, and there was a little offset here right down next to the water, probably a foot and a half or two feet—ran kind of back that way. It was quite steep. A man could not walk up that bank. It was so steep he could not walk up it. Of course he might crawl along the side. To go straight up it was so steep a man could not walk up.

Q. That is the reason, I suppose, those steps were made here?

A. Yes, sir. That is the reason those steps were

put there.

Q. Now, state in going—when Mr. Calfan ordered you to go after those boards—where you went.

A. I went across this staging to this board pile right here.

Q. When you stepped off the staging were there any loose boards in front of you?

A. Not between me and the pile of boards, no, sir.

COURT: Were the boards piled on the staging or on the bank?

A. Piled right on the edge of the bank, right on the edge of the bank.

Q. Were there any loose boards there?

A. No, sir.

Mr. GILTNER: If the Court please, I would like to introduce this in evidence.

COURT: Any objection, Mr. Senn?

Mr. SENN: We have no objection for purposes of illustration.

Marked "Plaintiff's Exhibit A."

Q. About what was the depth of the water between the coffer-dam and the East form that made the coffer-dam and the bank of the river? About what was the depth of water there underneath this staging, about?

A. Well, that varied. It was not very deep; it had been filled up in places so that it probably was not over a foot deep in places; some places two feet deep, but it was not deep at any place on the East side of the pier at that time. The water was low and there was no deep water on the East side of the pier.



Q. Was there any other way or any means of going from this coffer-dam on to the bank of the river at that time?

A. No, sir.

Q. Where were the men working that went over with you?

A. They were shoveling gravel out from around the pipe.

Q. Were any of them on the bank of the river?

A. I think not; not that I remember of.

Q. Were they removing any cement forms at that time from any part of the coffer-dam or from these piers?

A. No, sir.

Q. Was anybody working on the pier itself, the cement pier that went up?

A. There was one man working up there, a finisher, a concrete finisher. He was working there that morning.

Q. Now, Mr. Moore, I wish you would state to the jury what transpired after you got in the boat and went to the office. Don't state what anybody said, because you cannot state that; but what took place.

A. After I got in the boat and went to the office?

Q. Yes.

A. Why, I got in the boat and went over on the West side of the river, and I got out of the boat and went up through the docks to the office. The office was in the front part of the docks. But before I got quite to the office, Mr. Alexander and Mr. Mordaunt came out of the office.



Q. Mr. Alexander and who?

A. Mr. Mordaunt.

Q. Is this the gentleman here?

A. That is Mr. Alexander. And I was limping up through there, walking lame. I suppose they asked me what was the matter. I told them I had run a nail in my foot.

Objected to.

Q. Who was Mr. Alexander?

A. Mr. Alexander was one of the office men. I don't know what part he performed in the office, but he was one of the office men.

Q. Well, you don't need to state what was said. He objects to that. State what took place, what was done there.

A. Well, they asked me what was the matter, and I told them I had run a nail in my foot, and they says, Mordaunt says, "Sit down and take off your shoe," and he says, "I have got some turpentine here in the office. We will put some turpentine on it. That will be good for it." He turned around to go in the office to get the turpentine, and I sat down on a piece of timber there and took my shoe off. He came out, and as he was putting some turpentine on to it he, Mr. Dawson, the superintendent, came in the front door of the docks. And he says, "Tom what is the matter?" And I says, "I stepped on a nail over on the staging over there."

Mr. SENN: Your Honor, we object to that conversation.

Mr. GILTNER: Mr. Dawson was superintend-

ent—virtually it is the corporation.

COURT: What he would tell the superintendent is not any better than what he would tell the jury.

Q. Don't state what Mr. Dawson said; but what did you do?

A. Well, I went to Dr. Wheeler's office. I went in Dr. Wheeler's office, and I met a young lady, and I asked her if Dr. Wheeler was in, and she says he was not in at the time, but would be in in a few minutes. I sat down there a few minutes, and she went out and came in and she says, "Come over in the other office, Dr. Wheeler is in." I went over in another office, and I met young Dr. Wheeler and he asked me what was the trouble. I told him I had run a nail in my foot. And he examined it and got a tub of hot water and put some medicine into it and told me to put my foot into that. I held my foot into that for probably an hour, and it was paining me and hurting me so that I could not stand it, and I told him that I could not stand it there; and he says, "It is the best I can do, unless you can put into the wash stand or wash bowl," that they have in the corner of the room. And I told him I could do anything that would stop the pain. It was paining me so that I could not stand it. And I got up and put my foot into that, and I sat there for probably half an hour or more. And then he told me to go down to my room, that he would be down just in a few minutes. I went down to my room, and it was not but a few minutes until he came down. He looked at my foot and says, "You will have to go to the hospital." I says, "It does not make any differ-

ence where I have to go. I would like to get that pain stopped, because I certainly can't stand it long, the way it is hurting me." And he sent me to the hospital. They took care of it up there that night, put on hot dressings. The next morning old Dr. Wheeler came and examined it.

Q. The gentleman that testified here?

A. Yes, sir. And he told me that I would have to get up. I was in bed. He told me I would have to get up and put my foot in a tub of hot water, which I did.

COURT: Is it necessary to go over that again? Dr. Wheeler explained that.

Mr. GILTNER: I would like to have the jury—there is some little details.

COURT: He can testify about the pain and suffering, but to go through that in detail—

Mr. GILTNER: The Doctor did not state how long and what he did, and the minutiae about it. He remembers that more.

A. Well, I sat with my foot in hot water almost continuously day and night for three weeks. The swelling had got clean above my knee. They held a consultation among six or seven doctors, and was going to take my leg off above the knee. I told them, no, I didn't want them to do that. So we kept keeping it in hot water till I finally got it drawn down, right down, and settled in the front part of my foot, and formed a line across there, and the front part of my foot turned black. And so I persisted in waiting a day or two longer if I could draw more of it out. And Dr. Wheeler says, "Well, that is taking great

chances. If that poison should ever circulate back through your blood or go back into your system it would kill you." "Well," I says, "We will wait a day or two anyhow, and I will try to draw some more of it out." And I think we waited two days. I kept it in hot water, and the front part of my foot had begun to decay. My toe nails had fallen off. My toes had begun to decay, all except the little toe. The little toe stayed alive. So I gave my consent then to take it off. He took the little toe, it was alive, out, and peeled that back, as he told me later on. Of course I didn't know then, and took my foot off then, and then wrapped this skin right around here, and sewed across there, which leaves a very tender place. It is **very tender in** here yet. And it is taken off so far back—I have got considerable dressing on there now. But it is taken off more than straight back. It is in that kind of form. It don't benefit me much to walk on. After the amputation, he ordered me to put that foot in hot water. I put that foot in hot water—raw stub—right in a tub of hot water for four hours each day for a week after the amputation. I suffered from the loss of sleep, and from the suffering and the pain from that blood poisoning, from that foot, caused my hair to turn gray, turn white. And it was for four months that I suffered very severely. After it began to heal and get better, why of course I did not suffer so much. And I was there a year and three months, and there was times that it would heal up and look as though it was getting all right, and then it would break open again; probably it would take a week or so to heal it

up again. Kept on that way for quite a while. Finally it healed up, and was all healed up now. But it is very tender, very sore yet. I can't stand to walk on it to any extent. Of course I can walk around a little on it. It bothers me considerable.

Q. State, Mr. Moore, what effect it had on you; whether you could use it in performing your duties, your labor, whether you are able to.

A. Well, I was a carpenter by trade. I have worked at the trade considerable; and any man would know how much it would hinder a man from doing that kind of work. I don't think a man would be able to do scarcely any of that kind of work.

Q. How long did you stay in the hospital, did you remain in the hospital, and were compelled to stay in the hospital on account of that foot?

A. Well, I was there a year and three months, 15 months all told. Probably I could have went out a month or three or four weeks earlier than I did. But I was not able to do anything, was not able to support myself. I was not able to do anything or work of any kind on the foot.

Q. Are you able to do any work now?

A. I have not been, no, sir.

Q. State what effect, if any, it has upon your foot when you walk; if you notice any effect on it in the evening or walking.

A. Oh, if I walk to any extent, if I walk any amount during the day it gets very sore. It gets very sore, it hurts me in the evening.

Q. Does it swell any?



A. It swells some after walking on it.

Cross Examination.

Questions by Mr. SENN:

How long had you worked for the Union Bridge Company, Mr. Moore?

A. Between six and seven months.

Q. On the Broadway Bridge down there, on the various places?

A. Yes, sir.

Q. What kind of work were you doing? Common labor work?

A. Common labor work, yes, sir.

Q. And prior to that time, what kind of work did you do?

A. I worked on the Balfour-Guthrie's mill building—the Balfour-Guthrie's mill.

Q. Now, this little staging that you speak of, how long were these pieces here, referring to the stages?

A. Well, they vary. Those planks were from—I would say from 12 to 14 feet long; from 10 to 14 feet.

Q. And how many were side by side?

A. Well, four or five—I don't know. I didn't count them particularly.

Q. Were they spiked down?

A. No, sir, they was not.

Q. They were laid there?

A. They were just throwed down there for the purpose of using them.

Q. Just laid down there loose?

A. Temporary staging—that is all it was for.



Q. They were not fastened on either end, so far as you know?

A. No, sir. No, sir, they was not.

Q. They had just been laid down there, and they had just come off these forms?

A. They had been taken off. I don't know when they was taken off those forms.

Q. Now, you say that between the coffer-dam and the bank there were some places in there where it was practically ground all the way, wasn't it?

A. No, sir, there wasn't ground—water.

Q. Do you say there was water in all the places?

A. Water all through the coffer-dam.

Q. You say there were some dredgings had been thrown up here in between the coffer-dam, and gravel that came out of here and was thrown in here?

A. I didn't say there was any taken out of these and thrown in here, no, sir.

Q. Was there any in there?

A. There was ground in further than in other places, like the bank of the river, it varied along.

Q. You spoke of a log coming out here. Did it come clear from the bank to the coffer-dam?

A. No, sir; it didn't reach to the coffer-dam by a foot and a half, such a matter.

Q. Those planks were thrown on this log?

A. Yes, the north end of those plank lay on that timber.

Q. And this staging was about how far from the coffer-dam?

A. I presume about a foot and a half.

Q. And how far was it from the bank of the river on the other side?

A. Well, the water was very shallow there at the bank—it was probably two feet.

Q. Then you would step from the coffer-dam on to these loose planks that were thrown across the log?

A. Yes, sir.

Q. And walk across four or five, you say?

A. Yes, sir.

Q. And then you would step a distance of two feet onto the bank?

A. It would probably be two feet. I don't know exactly.

Q. There would be water between the staging and the bank a little.

A. The plank were not erected close together or anything. They were probably two or three inches apart—something like that. They wasn't placed up close together.

Q. Were they in perfect line or scattered around?

A. Oh, yes, they was in perfect line.

Q. But they were not spiked down, or nailed down, or anything of that kind?

A. No, sir, they wasn't spiked down.

Q. You don't know how they got there?

A. No, sir.

Q. Now, the staging was built along sideways?

A. Yes, sir.

Q. As is shown here?

A. Yes, sir.

Q. It was not thrown from the coffer-dam to the

bank?

A. No, sir; because those plank was from 12 to 14 foot long. That bank was so close here that to lay plank this way they would run away over on the coffer-dam here.

Q. You said there was a pile of lumber on the bank here?

A. Yes, sir.

Q. How many? How much of a pile was that?

A. Oh, quite a pile. I don't know how much. There was quite a pile of it there.

Q. Piled on the side of the bank?

A. Piled against the bank, yes, sir.

Q. It was piled from the bottom up?

A. Yes, sir.

Q. How many sticks do you suppose there were there? 100 or 200?

A. Yes, I suppose there were a hundred or a hundred and fifty.

Q. And they were piled up alongside the bank?

A. They was piled right up from the bank, yes, sir.

Q. Now, these planks were of various lengths, were they not?

A. Yes, sir, I think they was.

Q. They would run from what length?

A. Well, I don't know. There may have been some as low as ten feet; but I will say from 12 to 14 feet; probably some 16.

Q. It depends on where they would come off here?

A. Yes. They run sloping up towards the top.

The plank would be shorter up there a good deal than it would be at the bottom.

Q. After you got the nail in your foot, didn't you go over here on the bank?

A. No, sir.

Q. And sit down and take your shoe off?

A. No, sir.

Q. You are sure that you stepped right over here onto the coffer-dam and took a boat?

A. Right back over here to where Mr. Chalfan was, and took a boat from there to the West side.

Q. Isn't it a fact, Mr. Moore, that you sat down on the bank here, and took your shoe off there?

A. No, sir.

Q. You never went on the bank at all?

A. No, sir; not after I run the nail in my foot, I didn't.

Q. Did you have—you didn't have a plank at that time?

A. No, sir.

Q. And the first time you took your shoe off was over at the office?

A. Was over on the docks.

Q. That is across the river, on the West side?

A. Across the river on the West side, yes, sir.

Q. And after you ran the nail in it you never went on the bank at all?

A. No, sir.

Examination by the Court.

Q. Do you know when that staging was built?

A. No, sir.

Q. Do you know what it was built for?

A. It was built to carry that lumber from the confeder-dam to the bank.

Q. You don't know who built it?

A. No, sir.

Mr. GILTNER: Mr. Piltz testified to that.

Mr. SENN: No, he didn't testify to it.

Mr. GILTNER: I think he did.

Cross-examination continued.

Q. Now, you say these planks here, there were about four or five—how wide were they?

A. Well, they were 2x6 or 2x8. I wouldn't say positively which.

Q. 2x6 and 2x8?

A. 2x6 or 2x8.

Q. That is, they were six or eight inches wide?

A. Inches wide, yes, sir.

Q. And they were just laid side by side?

A. Yes, sir.

Q. Loose on these poles?

A. Yes, sir.

Q. This is the first time you had ever been there, was it not?

A. The first time I had ever worked down there, yes.

Q. You don't know what that was built for, do you? You didn't see it built?

A. I didn't see it built, but it couldn't be used for anything else.

Q. You just saw the boards lying loose there, one end on the log?

A. It was put in there as a staging to go from the pier to the bank.

Q. Now, Mr. Moore, wasn't it a fact that there was a float on the north end, where the men would walk back and forth?

A. There was a float at the north end, but not connected with this pier. Nor you couldn't get from this float to this pier without making a staging from the pier to the float.

Q. Well, now, wasn't it right up against the pier, and the men would walk right off the float onto the coffer-dam?

A. No, sir, it was not.

Q. What was the float anchored to?

A. It was anchored to the bank of the river. I don't know what it was anchored to, but one end of it was tied to the bank of the river.

Q. One end was on the bank?

A. Yes.

Q. And wasn't the other side up against it?

A. The other end floated out on the river loose.

Q. Floated out loose?

A. Yes, sir.

Q. Did you have to go across a plank to get onto the float?

A. If you got onto the float at all you would have to. You couldn't get onto the float as it was.

Q. This float would take a couple of feet of water, wouldn't it?

A. How is that?

Q. This float would take a couple of feet of water



to float it?

A. Yes.

Q. And it would be from the bank probably three or four feet, wouldn't it?

A. No. The end of it was right up against the bank, right at the foot of the stairs; right to the foot of the steps. The end of it was connected right with the steps, and projected out into the river.

Q. How wide was this float?

A. Something like three—three and a half feet wide.

Q. Now, you say that at this time you were going to take some pipes out?

A. Yes, sir.

Q. Were these pipes buried in the sand and gravel?

A. They were covered up where they were jointed. They wasn't buried. They stuck up through.

Q. How heavy were they?

A. Oh, they were pretty heavy. I don't know how heavy they were.

Q. Very heavy pipes, were they not?

A. Quite heavy pipes, yes, sir.

Q. And you would take them out with a derrick, wouldn't you?

A. Well, we hadn't taken any out when I left there. When I got hurt we hadn't taken any out.

Q. You were loosening them, and that is what you were sent over there for?

A. We were shoveling gravel over. We hadn't loosened any. We hadn't taken a tap nor a bolt out

at the time I got hurt. We hadn't got down to them yet. Hadn't got it cleaned away.

Q. But your intention was, after you had them loosened, to hook on with a derrick and hoist them out?

A. I didn't know whether they intended to hoist them onto a derrick or throw them down on the coffer-dam. There was plenty of room for them. There was no derrick there at that time.

Q. Wasn't there a scow back of the pier, out into the river?

A. No, sir.

Q. Well, now, Mr. Moore, you said that after you stepped on the nail on the staging you stepped back onto this coffer-dam?

A. Yes, sir.

Q. And you didn't go to the bank?

A. No, sir, I didn't.

Q. Well, you stepped from the coffer-dam onto the float then, didn't you?

A. No, sir.

Q. Well, how did you get onto the float?

A. I wasn't onto the float.

Q. Did you take the boat from the coffer-dam?

A. I did.

Q. Or from the float?

A. From the coffer-dam.

Q. Where was the boat at that time? Wasn't it attached right to the float?

A. No, sir, it wasn't attached to the float; nor I don't know just where the boat was at that time.

Q. Isn't it a fact that they always had the little skiff or boat attached right alongside the float, and the men would step from the coffer-dam onto the float, and into the boat?

A. No, sir, not always.

Mr. GILTNER: I would like to ask him one question, so as to get it clear. How long had you worked there before the accident happened?

A. I presume about an hour and a half; near that time.

Q. Now, how wide was this little—these loose boards that were lying on this log, altogether?

A. Well, something like three and a half feet—three feet, or something like that. I don't know.

Q. You say there were four or five of them, and they varied from six to eight inches wide?

A. Probably they were eight-inch stuff, or six-inch stuff—I don't know which. But they were not laying close together. There was probably two or three inches space between them.

Q. And from this plank to the river was about two feet, to the edge of the river?

A. Something like that. It wasn't—I don't know exactly—probably a foot and a half or two feet.

Q. And you say all this lumber that was piled there on the bank, to the number of about 100 to 150 pieces?

A. Something like that, yes, sir.

Excused.

Adjourned until Monday morning at 10 o'clock.

April 14, 1913. 10 a. m.

T. H. MOORE resumes the stand.

Direct Examination Continued.

Mr. GILTNER: If the Court please, on Saturday when counsel concluded his cross examination of this witness I intended to ask the Court for leave to ask him one question on direct examination which I overlooked. And that was in regard to the shoe and the condition of his shoe, that I overlooked in the direct examination; what became of that shoe?

COURT: Very well, you may ask the question.

Mr. SENN: We are making no claim about the shoe, your honor.

Mr. GILTNER: I want the jury to know about it; I am asking—

COURT: Very well.

Mr. SENN: No objection.

Q. Mr. Moore, will you please state to the jury what kind of shoes you wore on the day on which this accident happened; you ran the nail through the shoe?

A. I had a reasonably good pair of working shoes on that I wore probably four or five weeks.

Q. How thick were the soles?

A. Well, good ordinary soles—good as there is on an ordinary working shoe.

Q. And the nail that projected through the plank projected through about what distance?

A. About an inch and a half.

Q. What became of that shoe, those shoes?

A. After I was sent to the hospital and had my foot amputated, my partner that was rooming with me put my shoes on and wore them out.

Q. What was his name?

A. H. R. Miller.

Mr. GILTNER: That is all.

Plaintiff rests.

THOMAS HUGHES HOLMES, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. SENN:

Where do you live, Mr. Holmes?

A. My residence in Portland, do you mean?

Q. Yes.

A. 369 Williams Avenue.

Q. And how long have you lived in Portland?

A. I first resided there in June of 1911.

Q. What is your business?

A. Civil engineer.

Q. And how long have you been engaged in that business?

A. 8 years.

Q. And at what points?

A. Different points throughout the United States.

Q. And on what bridges?

A. Well, various bridges; quite a long list of them if I name them.

Q. Just mention a few.

A. Well, the Thebes bridge, that is at Thebes, Illinois, across the Mississippi River; Red River bridge in Arkansas, and Trinity River bridge in Texas, and Hawthorn bridge, Chicago.

Q. Are you a graduate of any school?

A. No, I am not a graduate.

Q. Whom were you associated with on the Broadway Bridge?

A. Ralph Modjeski.

Q. Who is Ralph Modjeski?

A. He is a consulting civil engineer of Chicago; bridge builder.

Q. Is he the man who designed this bridge?

A. He is.

Q. In whose employ are you?

A. Ralph Modjeski's.

Q. But in whose employ is Ralph Modjeski?

A. He was employed as consulting engineer by the City of Portland.

Q. In building the Broadway bridge?

A. In building the Broadway Bridge.

Q. What are your duties on this bridge?

A. Well, they are various—the inspection of materials and workmanship, and giving of all lines and grades for the construction of the bridge, and practically seeing that the bridge is built according to plans and specifications.

Q. You then have practically the active supervision of the building, haven't you?

A. I have.

Q. Mr. Modjeski, I understand, is in Chicago?

A. Yes.

Q. Were you working on this bridge on the 2nd day of October, 1911?

A. I was.



Q. How many piers were in process of construction at that time, do you know?

A. To the best of my knowledge, I believe piers 2 and 3, and piers 5, 6 and 7.

COURT: How were they numbered, from which side of the river?

A. Beginning on the West side, they were numbered from one to seven.

Q. Did you make any drawing, Mr. Holmes, as to pier 7, the place where Mr. Moore was injured, as to the shore line and the height of the water, on or about October 2, 1911?

A. I did.

Q. I will ask you to look at this drawing and state whether this is the drawing you made.

A. That is the drawing I made, yes, sir.

Q. I wish you would just step before the jury. Is this an accurate drawing of the conditions at that time?

A. That is accurate, yes.

Q. I wish you would step before the jury, Mr. Holmes, and explain.

A. The drawing was made—

Mr. GILTNER: Just a moment. I would like to ask him some questions.

COURT: Very well.

Cross Examination.

Q. When did you make this?

A. This drawing was made about a week ago.

Q. What did you make it from?

A. Made it from records which we have in our

office, and water records which I got from the Government Station here in Portland to verify my own records.

Q. Who made the original records?

A. The original records were kept—

Q. Who made the original record?

A. I don't understand just what you mean. The original—

Q. Who made the original record from which you took this?

A. It was made by Mr. Weidemann, myself and various other men employed in the construction of the bridge in the engineering department.

Q. What part of it did you make?

A. The records of sinking, the height of the water at that time, various records; the condition of the work as it progressed.

Direct Examination Continued.

Q. Now, Mr. Holmes, probably if you could stand and face the jury, so these gentlemen down here could see it—

A. The drawing was made in three different views to show more plainly the conditions all the way along the pier.

Q. Now, referring to this line, which I will mark with "A"—what does that represent?

A. That represents the shore line of the stage of the water that it was on October 2, 1911.

Q. And the letters "B" and "C"—what do those represent?

A. The intersections of the center line of the

bridge and the—or rather the center line of braces and the center line of piers, which would be the center line of pedestals on which the bridge was supported.

Q. And the letter “D”—what does it represent?

A. That represents the center line of bridge?

Q. That is the coffer-dam?

A. Yes, which is also the center line of the coffer-dam.

Q. And the letter “E”—what does that represent?

A. That is the float, which was used at that time as a landing.

Q. Now, Mr. Holmes, I want you to explain the distances, and the manner of the construction and everything to the jury so that they will understand it; and probably if you could step there—

A. This plan shows a view of the caisson or coffer-dam as some people call it, and the concrete pedestals, looking down from the point directly over it.

Q. Now, what is the distance along here? How long is this?

A. The coffer-dam is 68 feet in that direction, that is North and South.

Q. That is, the line marked “D” is 68 feet?

A. Yes, sir. The coffer-dam is 20 feet in the other direction.

Q. 20 feet that way. I will mark that with an “F.” That is 20 feet?

A. That is 20 feet.

Q. So the coffer dam is 68 by 20 feet?

A. 68 by 20 feet.

Q. Is that the casing that incloses the 2 piers?

A. Yes. That is outside measurements of the foundation.

Q. Now, what are the dimensions of these piers "B" and "C"?

A. Those are—those pedestals are 14 feet and 9 inches, about.

Q. Square?

A. At the base. Yes, sir, they are square.

Q. And do they taper a trifle?

A. There is batter to them. They taper, yes, sir.

Q. Now, this space in here, on October 2nd, which I will mark with a "G"—what was that on that day, according to the Government records and your records?

A. That is all land, dry land in there.

Q. Was this dry land in here?

A. It was also dry land, extending over the top of the caisson.

Q. What is this here that you have marked as a float? What was the purpose of that float, and where was it located?

A. It was located at the extreme North end of the caisson or coffer-dam and was used as a landing for boats, etc., and also used by the engineering department for setting a ladder on there to get to the top of the piers. It may have had various other uses.

Q. What is the fact as to whether or not this float was against this coffer-dam?

A. Well, the float was anchored against the coffer-dam. That is, it was tied to it; otherwise, the

river flows North here, it would swing the float around, especially when the tide was going out.

Q. It would take the float down this way?

A. Yes, sir.

Q. Was it up plumb against the coffer-dam?

A. Up against the coffer-dam, yes, sir.

Q. What is this little mark "H?"

A. That is a view of the ladder looking down on top of it. That is looking straight down.

Q. Where did that ladder go to?

A. The ladder extended from the float to the top of the permanent work—to the top of the pedestal.

Q. That is, if you wanted to get to the top of the pedestal you would go out here on the float and take the ladder up?

A. That is correct.

Q. How high is this pedestal?

A. About 25 to 30 feet above the water at that time.

Q. There has been something else put on since then?

A. Yes, sir; there has been steel cylinders filled with concrete extending the pedestal on up to the present top of it.

Q. Now, when you made up this shore line on October 2, 1911, from what records did you make it?

A. My records kept daily as to the condition of the work, that was kept here, our office elevations, etc., show practically what the shore line would be at that time.

Q. How often would you go to those piers?



A. Probably five or six times a day, depending on the work we were heaviest engaged on.

Q. Was it your duty to be from one pier to the other all the time?

A. It was.

Q. Did you ever see any staging or scaffolding from the shore line here in the center of these two piers to the bank?

A. I never did.

Q. In getting on to the coffer dam, how would you get on to it?

A. There were possibly two ways. The most convenient would be to walk down the stairway and across on the planks shown there and the float, and step from there on the coffer dam. It was right up against it.

Q. Was this stairway that ran up to the bank up the East side?

A. It was.

Q. You would walk on to the float and then step on and walk around?

A. Yes, sir.

Q. There has been some testimony here, Mr. Holmes, about a log, an old log, that projected out from the bank. Do you remember of an old log being there from the bank?

A. Well, at that point there are—the bank is held in place by numerous logs extending into it endways, other logs lengthways of the bank, to hold the position of the bank, the slope being too steep to permit of it staying up of itself.



Q. Did there any log run out toward the coffer-dam?

A. Yes, there were logs ran out toward the coffer-dam.

Q. Where was this log?

A. There were logs at this point that extended nearest the coffer-dam, the point here, about, I should say, 8 feet from the South end of the coffer-dam.

Q. We will mark that with figure "J". That was about 8 feet from the corner?

A. To the best of my recollection it was.

Q. Now, how far from the coffer-dam did that come?

A. That came within about 6 or 8 feet of the coffer-dam, possibly 10.

Q. And it ran into the side of the bank?

A. Ran into the bank.

Q. Now, assuming that the space marked with "G" was all dry land on that day, was there anything to prevent a person from walking from the coffer-dam over the dry land on to the bank?

A. Absolutely nothing.

Q. This space marked by "J" and the space just North of the float—there was water in there?

A. Water there.

Q. But this space in here was dry land?

A. Dry land.

Q. Referring to the view—we will call that view 1—referring to view 2, what does that represent?

A. That is an elevation, a side elevation, a side view, showing the elevation of the concrete pedes-

tals. That would be the same view as a person standing on the East bank and looking West, directly West at the pedestal—

Q. You have a place marked here with a ladder—what was that ladder?

A. That ladder was used by—mostly by the engineering force when getting to the top and correcting our lines, that is, verifying our location of the pier to see that it was exactly on the line where it was supposed to be.

Q. Is that the same ladder you testified to that was on the float in view 1?

A. That is the same ladder.

Q. And it ran up from the float on to the side of the pier?

A. Yes.

Q. And referring to view 3, you have set forth a stairway there. Is that the stairway that was there at that time?

A. That is the stairway that was there at that time.

Q. And does this represent the float along there?

A. That is the float at the North end.

Q. And this is the ladder?

A. That is the ladder.

Q. This No. 2 is a side view; No. 3 is the end view, and No. 1—

A. The plan—

Q. Looking down?

A. Looking down.

Q. Mr. Holmes, do you remember on or about

October 2, 1911, of seeing any one sitting on the bank with his shoe off?

A. I do.

Q. Just state what the facts are.

A. Well, I was coming down the stairway, which is shown on the plan, to go to pier 6. I had an instrument and my assistant was with me. I noticed a man sitting there on the bank as I went by. It impressed itself on my memory because the man sat there with his shoe off, so I naturally supposed that he had been hurt, although I did not go over to investigate, being busy at the time; and seeing more or less accidents on numerous pieces of work that I have been on, I do not pay much attention to them.

Q. Did you know Mr. Moore at that time?

A. Not to my knowledge. To the best of my recollections I did not know him.

Q. Of course you don't know who it was, only you remember of seeing some one there at that time?

A. That is all. I could not point the man out.

Q. Is that the only time you saw any one there with his shoe off on the bank?

A. Yes. Yes, that is the only time that I remember of seeing any one sitting on the bank there.

Q. Was that on the East bank of the river?

A. It was on the East bank of the river.

Q. What is the fact, Mr. Holmes, as to whether there were many form boards laying there on the bank?

A. There were numerous form boards laying around at that time.

Q. And of what length were they?

A. None longer than 16 feet, and some shorter than that—possibly running down to the shortest length would be about 8 feet.

Cross Examination.

Questions by Mr. GILTNER:

Were you in this city on the 10th day of December, 1912?

A. 10th day of December?

Q. Yes.

A. I don't think I was. I was employed at that time in Central Oregon, or was about to leave for Central Oregon at that time.

Q. Well, do you know whether you were or not?

A. No, I do not know whether I was or not. I could very easily tell by consulting the records or diary which I keep whether I was here at that time.

Q. In whose employ were you at that time?

A. The 10th day of December?

Q. Yes.

A. In Mr. Modjeski's employ.

Q. Who is he?

A. He is a consulting civil engineer of Chicago.

Q. Who?

A. A consulting civil engineer of Chicago, his main office is in Chicago.

Q. You say you were in the employ of the defendant company in the construction of this Broadway Bridge?

A. I have never been in the employ of any one

in the City of Portland except Mr. Modjeski.

Q. What business did he have? Who was he? He was employed on the Broadway Bridge, was he not?

A. Mr. Modjeski?

Q. Yes.

A. He was employed by the City of Portland as a consulting engineer.

Q. And you were assisting him?

A. I was assisting Mr. Modjeski, yes. I was on his work.

Q. Now, you cannot remember whether you were here on the 10th day of last December?

A. I do not, for the simple reason that close to that time, on the 10th or 12th, I left for Central Oregon point. I also came back a number of times; was in and out of the city for possibly two weeks, ranging from the 8th to the 15th or the 20th of December.

Q. Do you remember when this case was tried before?

A. I do not.

Q. You say you came here last June?

A. No, sir. I said—

Q. In June, 1911?

A. That is correct.

Q. Are you acquainted with Mr. Alexander?

A. I am.

Q. Have you had any talk with him about this case?

A. Yes, sir, I have.

Q. What makes you know that on the 2nd day of October, 1911, you saw a man sitting on the bank

of the river with his shoe off? What makes you know that?

A. Well, the statement that I made that I saw a man sitting there on the 2nd of November is merely about that time, and my knowledge that has come to me since has verified the fact that it would be the 2nd day of November.

Q. Second day of November?

A. Second day of November, yes.

Q. You are positive that it was the second day of November?

A. No, I am not positive that it was the second day of November.

Q. It might have been the 5th day?

A. Yes, it might have been the 5th day.

Q. It might have been the 6th day?

A. Yes, sir.

Q. But you are positive it was in November?

A. Positive it was in November.

Q. Now, is there anything unusual to see a man sitting on the bank of the river with his shoes off? Might have been in wading in there, or something of that kind?

A. I never saw but the one man.

Q. Yes, but is it anything unusual to see a man sitting on the bank of the river with his shoe off?

A. Well, possibly in November it would be unusual, the water being cold at that time.

Q. Well, now, did you make a note of that in your book?

A. Of the accident?



Q. Yes. No, no. I mean of this man sitting on the bank of the river along in November, 1911.

A. I did not.

Q. Well, how did you happen to state, or whom did you happen to state to, that you saw a man sitting on the bank with his shoe off? Whom was it you stated that to? Didn't some one ask you if you did see him?

A. Yes, stated to Mr. Senn just now.

Q. Well, I mean before you testified in this case. Whom did you talk to as to whether you saw a man sitting on the bank of the river in November?

A. Well, I might have mentioned it, but I don't know to whom. I don't recollect that I ever did mention it.

Q. Isn't it a fact that you were asked that question, and you were talked to about this before you came to testify in this case?

A. I talked to Mr. Alexander and Mr. Senn in regard to the case.

Q. And you then volunteered to them that you saw a man sitting on the bank of the river with his shoe off, didn't you?

A. When they called my mind to the case, I did, yes.

Q. Well, they called your attention to the facts before you remembered it? Isn't that a fact?

A. Mr. Alexander spoke about the case and the condition of the work at that time. That brought it to my mind again, yes.

Q. Now, how do you know it was November?

A. Well, we were sinking pier 6 at that time. We had it possibly half way down, and the number of feet escapes my memory now, and the work that came up about that time in connection with pier 6 is directly in conjunction with the work I was doing at that time. So you see from my records of what I was doing at that time on the work confirms the fact that it was in the month of November, or at the best the latter part of October.

Q. Then you were working at that time on pier 6?

A. We were doing work on pier 6 at that time, yes. I beg your pardon, I should say pier 5.

Q. Where was that located as to this pier 7?

A. It was 600 feet west of pier 7.

Q. How long had you been working on that pier?

A. Since—

Q. I mean yourself, prior to that time?

A. You mean on pier 5?

Q. Yes.

A. We started there to the best of my knowledge about the first of October or the latter part of September.

Q. Were you there continuously working on that pier?

A. No, I was working—my personal service on that pier required all the time?

Q. Yes.

A. No, my work covered all the piers that were in the course of construction.

Q. Well, now, on this day of November on which you saw this man sitting on the bank of the river—

were you working on that pier that day?

A. On pier 6?

Q. 5.

A. Pier 5, I beg your pardon.

Q. Yes.

A. Pier 5. Yes, we did work on that pier that day.

Q. You were there all day?

A. No.

Q. Where were you during the day?

A. Well, if you are familiar with bridge work you know there are various duties—you are confined for probably 30 or 40 minutes—

Q. I am not asking you that. I am asking you where you were working in addition on that pier that day.

A. Various points on the site of the Broadway Bridge.

Q. Tell this jury what these points were, and where the points were.

A. Beginning at Hoyt Street on the West side, from the East property line of Hoyt Street to the West property line of Larrabee Street on the East side, is the work that we had at that time.

Q. That was in November, you say; about November 6th or 2nd?

A. November 2nd.

Q. Now, what were you doing, or were you over on pier 7 on that day?

A. Pier 7. Our office is located, was located at that time at Cherry and Crosby Street, which is one block from Broadway, one block South of Broadway.

The most convenient way for us to get on the work was to walk from the office where we kept all our instruments and materials we used in the work, was to walk down a path directly to the center line of the bridge and down a stairway there on to the float mentioned at pier 7. That was the way we used of getting from one side of the river to the other and to the piers out in the river.

Q. And did you go on to pier 7 on that day?

A. On to pier 7 on that day?

Q. Yes.

A. Yes, I think there was not for a time there, 2 weeks, that I was not on the pier.

Q. Well, do you know positively—were there any days that you were not on pier 7 during the month of November?

A. I don't know that there were not days that I was not on pier 7. I think that I was on pier 7 every day.

Q. At the time you saw this man sitting on the bank of the river that you speak of, did you go on to pier 7, or did you go on over to pier 5?

A. I stepped on the float and from the float into a boat and went over to pier 5 at that time.

Q. How long did you stay on pier 5?

A. That is a little hard to remember, but I should say the work that I was doing at that time would have taken me possibly three-quarters of an hour.

Q. Then where did you go?

A. My movements are not just exactly certain after that. The chances are that I brought the in-

struments back to the office.

Q. What time was it you went to work that morning?

A. Well, I can only tell you in a general way of it. I went to work most every morning between half past seven and possibly a quarter after eight.

Q. Well, then, it was about a quarter after eight when you went to work that morning?

A. Well, it might have been half past seven, or it might even have been seven o'clock.

Q. Well, wasn't it 9 o'clock?

A. It is not hardly possible that it was 9, because the mornings—the work was being rushed at that time so much that I could not be off the job.

Q. Well, then, it must have been probably about between 7 and 8 o'clock.

A. Between 7 and 8 o'clock would probably be the time I went to work that morning.

Q. And between seven and eight o'clock in November, 1911, you saw this man sitting on the bank of the river?

A. Well, not between seven and eight o'clock. I could hardly say as to the hour on which I saw him.

Q. You saw him, you say, when you were going to work?

A. When I was going to do that particular piece of work, not when I was going to work in the morning.

Q. What particular piece of work were you going to do?

A. The location—it would be—probably be rather a lengthy explanation—the location of piers requires



some instrument work that is more or less intricate, and to do that we locate from a base line on shore. And we have to make numerous trips to the pier in question in order to get the levels on the corners of the coffer-dam. The levels is, I think, what I was after at that time, getting levels.

Q. What time was that that you saw this man on the bank of the river?

A. I could not say positively.

Q. Was it in the afternoon or forenoon or noon, or what time?

A. I could not say positively as to what time of day it was when I saw the man on the bank of the river.

Q. Well, do you mean to say you saw that man sitting on the bank of the river?

A. I don't know the man, I am sure. I possibly would not remember him. I can't say that that was the man, no.

Q. Now, who called your attention to the fact that a man was sitting on the bank of the river with his shoe off, Mr. Alexander or Mr. Senn?

A. Well, after the—when the incident was discussed, it recurred to my mind that I had seen this man, and I spoke of my having seen him to Mr. Alexander first and to Mr. Senn later.

Q. Hadn't they told you that there had been a trial of this case before?

A. Yes.

Mr. SENN: We object, your Honor, to that line of examination.



Mr. GILTNER: This is cross examination.

Mr. SENN: I don't think it is fair for counsel to insinuate these things. That hasn't any bearing on this case.

Mr. GILTNER: Well, I will show that it has.

Q. Didn't they tell you about the testimony of a Mr. Chalfan and Hoffstatter in regard to their seeing a man sitting on the bank of the river with his shoe off?

A. No. I didn't hear anything about the details from anybody of the case having been tried before. I merely knew that it was tried before.

Q. Well, didn't they tell you that Mr. Chalfan and Mr. Hoffstatter had seen a man sitting on the bank of the river with his shoe off—didn't they tell you that?

A. They did not. They did not. Possibly after I mentioned the fact that I had seen the man sitting there, they may have said that that was in line with what other people had said. But certainly not—

Q. Isn't it a fact that you did talk about that?

A. No. Well, I said possibly—I will take that back. It is a fact that the man sitting on the bank was not mentioned to me, that I recalled that incident.

Q. Now, what did they say to you about these men, stating that they saw a man sitting on the bank of the river with his shoe off—what did Mr. Alexander say to you about that?

A. There wasn't anything said about the man sitting on the bank of the river. The questions they

asked me merely had to do with the work at that time—the condition of the work at that time. And in asking about the condition of the work at that time, and my telling them I remembered the man sitting on the bank and spoke of it.

Q. What connection did you think that had with this case?

A. Well, it is very reasonable to suppose that he was the same man.

Q. Yes. But then before that, you knew that, they had told you that a man had run a nail in his foot, didn't they, on the bank of the river?

A. They had told me.

Q. They had told you that before?

A. They didn't say he had run a nail in his foot certainly—it didn't interest me possibly.

Q. I am not asking you whether it interested you. But they had told you prior to this time that a man was suing the Union Bridge & Construction Company for running a nail in his foot, didn't they?

A. Yes, sir.

Q. And they had told you then that there had been a trial of this case before, didn't they?

A. Yes.

Q. And they told you then at that time that they had witnesses here who testified that they saw a man sitting on the bank of the river with his shoe off, who had run a nail in his foot, didn't they?

A. No, they did not.

Q. There had not—

A. They did not.

Q. When did they tell you that?

A. They did not tell me that. They consulted me in regard to the condition of the work at that time.

Q. But didn't you just testify that they had told you after you had suggested it to them that two other witnesses had testified to that in that other case?

A. After—

Q. Yes.

Mr. SENN: No. The witness did not testify to that.

A. After I was consulted in regard to the condition of the work, I mentioned having seen the man, and after that they told me that that was in line with what others who had witnessed the thing had seen.

Q. What other witnesses had testified—and you are positive now that that testimony—that that statement that they made to you was after you had suggested to them that you saw a man there?

A. Very positive.

Mr. GILTNER: Are you going to offer this in evidence?

Mr. SENN: Yes.

Q. Who was it told you that? Which one of these gentlemen, Mr. Alexander or Mr. Senn?

A. I think it was Mr. Alexander.

Q. Where was it?

A. At our office on the East bank of the Willamette River.

Q. What?

A. At our office on the East bank of the Willamette River, which is at Crosby and Cherry Street.

Q. Now, coming back to the proposition there as to the time you saw this man sitting on the bank of the river. You cannot tell whether it was in the forenoon, the afternoon or at noon, can you?

A. No, not positively.

Q. It might have been in the forenoon about 10 o'clock, isn't that a fact?

A. It might have been. It might have been any time during the day. I cannot say positively just what time it was.

Q. It was two years ago, pretty near, wasn't it?

A. Two years ago this coming November.

Q. And you remembered back that you saw a man sitting there two years ago, this incident?

A. I did.

Q. Had you made a note of it in any place among your notes?

A. I had not.

Q. Now, how long were you on this East pier, this pier No. 7, on this day in November that you speak of?

A. How long was I on pier 7?

Q. Yes. That day that you went to work that you saw this man sitting there.

A. That would be a little bit hard to say. I could not say as to the exact number of minutes or hours I was on that pier at that day.

Q. You say that that was the condition of the shore line on that day on which the man was sitting these?

A. That was the condition of the shore line that

day.

Q. Well, now, have you got the notes with you from which you made this shore line on that day?

A. I have not.

Q. Where are they?

A. The notes from which that was made are in various places, some of them in note books which we have at the office there of the shore line, of the water line of course you know, and the Government has notes showing the water line at that time.

Q. Have you got the original diagram of these on that day showing the shore line?

A. Well, we don't make a diagram daily.

Q. Then you didn't make this from an original diagram? Then you didn't make this shore line from an original diagram? This you made up yourself, didn't you?

A. I made that up from notes of our work.

Q. Now, where are those notes?

A. Well, if you were a little bit more familiar with the Broadway Bridge—

Q. I didn't ask you that.

Mr. SENN: I think he has a right to explain it.

Mr. GILTNER: He said he made it from notes.

COURT: Can you tell where those notes are?

A. The notes might be in various places, various different books. You can't keep everything in one small book in the construction of a bridge of that size. In case you want information of a kind I have shown there in the sketch, it is necessary to go through quite a number of books and to correlate different



matters.

COURT: Where are the notes? Who has them?

A. The notes from which I made that sketch?

COURT: Yes.

A. They are in Mr. Modjeski's office.

Mr. GILTNER: Will you bring those notes here so as to show us the notes from which—Who made those notes, the original notes?

A. Some of them were made by Mr. Weidemann, some of them by myself, some by Mr. Carter, others by Mr.—

Q. Were there any notes among those notes you speak of that you made at that time in regard to this shore line in your handwriting?

A. No. And showing the shore line?

Q. Yes.

A. The notes would not show the exact shore line at that time. The notes would show the height of the water on the pier and the ground line would naturally follow the height of the water, and we know how much ground there is over the top of the caisson there.

Q. Then your notes do not show the shore line?

A. No. It would be impossible to make a daily picture of that.

Q. When you made this shore line there, you made it from what you figured what it might be.

A. That is practically correct, yes.

Q. Now, I wish you would answer this to the jury. Isn't it a fact that the water ebbs and flows there some?



A. You mean that the tide had an effect on it?

Q. Yes.

A. Yes, that is correct.

Q. And do you know whether it was high tide or low tide when this was made?

A. No. I do not. I don't remember.

Q. Then if this was made at low tide, the land, the shore line, would not extend out there, would it?

A. There would be some difference between the shore line at high tide and low tide.

Q. Do you know how much the tide ebbed and flowed there at that time?

A. From my knowledge of what—I believe at 10 feet there is no tide. Under 10 feet and approaching zero on the city meter there is about 2 feet of tide.

Q. Do you know what the height of the tide was on the morning of November that you speak of, 1911, when you saw this man sitting on the bank of the river?

A. Do I know?

Q. Yes.

A. I will ask you to repeat that question.

Question read.

A. I do not.

Q. Have you investigated from the records here, the city records, or the engineer at the Custom House, to find out what the height of the tide was for that day?

A. I merely verified my own observations made at that time as to the height of the water, from the Government office here.

Q. Well, now, what did you find out?

A. I found the height of the water to read 2.2 feet on the Government gauge, which means 5 and about 5-10 feet on the city gauge, the city datum being 3-3|10 feet above the Government datum.

Q. On the day on which you went by there in November—you say that is the day on which you saw him sitting there on the bank of the river—did you notice whether there was any ground extending or the shore line extending as to the place where you mention here, as you have put down there? Did you look to see whether it was?

A. From having worked around there and knowing the condition of the river during October and November, and knowing the shore line there, I can say positively that the shore line did extend I should say very closely to what is shown on the diagram.

Q. Well, now, did you notice—I want you to answer this question—did you notice on this morning, on this day on which you saw this man sitting on the bank of the river, as to whether or not the shore line extended as it was on that map? Did you go and look to see?

A. I did not.

Q. No, you did not?

A. I did not.

Q. And that date might have been on the 6th as well as the 2nd day of November?

A. It might have been.

Q. And might have been a little later?

A. Might have been a little later. The shore line

did not change during October and November very much, possibly a matter of a few inches.

Q. Now, coming back to this float. Mr. Senn, will you please hold that there? Didn't that float vary in distance from this pier or from this coffer-dam? Didn't it float away and to and from it?

A. Not greatly—a matter of inches if it varied at all. It had to be tied slack on account of the tide coming in so as not to swamp it.

Q. What was the slack? Wouldn't that float float 4 or 5 feet away from this coffer-dam?

A. Certainly not.

Q. You are positive of that?

A. Very positive.

Q. You are sure of that?

A. Very sure.

Q. And you are sure that on the day on which you saw this man sitting on the bank of the river with his shoe off that this float was right up against this coffer-dam?

A. Yes, sir.

Q. Well, it was tied with a rope, wasn't it?

A. Tied to what?

Q. The float was tied with a rope against the coffer-dam, wasn't it?

A. Yes.

Q. State to the jury where that was tied.

A. It was tied on the end nearest the side view and to that corner of the coffer-dam.

Q. Whereabouts?

A. Right where Mr. Senn's finger was first; right

there.

Q. Put a letter X there, where he says that was.  
(Mr. Senn marks an X)

Q. You noticed that in the morning when you went over there, didn't you?

A. Well, that was where it was always tied. It is safe to assume it was tied there on that day.

Q. Never was loosened at all?

A. Not to my knowledge.

Q. That is, the rope that attached it never has been unloosened from there at all?

A. Not to my knowledge. It might have been.

Q. Now, then, you came on to this coffer-dam that morning to take a boat, did you?

A. Not on the coffer-dam. I was not on the coffer-dam at the time I spoke of before to take the boat. I took the boat from the float.

Q. Oh, you took the boat from the float?

A. Yes.

Q. What else did you see around here, anything else around this coffer dam?

A. No, I can't say that I noticed anything positively at that time.

Q. Were there any boats, any other boats around there?

A. There were. There were barges there at that time. I don't know that I noticed them particularly, but I know that they were around about that time.

Q. Well, you say you didn't notice them particularly. Were there—would you swear there were any there?

A. No, I would not swear there were any there. While I might know in my own mind that they were there, still unless you notice a thing particularly you probably would not care to swear to it.

Q. You are not prepared to say whether there were or not?

A. No.

Q. Then, when you stated there was a barge or barges around there, you were guessing at that, were you not?

Object to drawing conclusions like that.

Q. Isn't that a fact?

COURT: I will sustain that objection.

Q. Then you are mistaken about that?

Mr. SENN: We object to that.

COURT: I will sustain that objection.

Q. I asked him before if he was not guessing; asked him if he was mistaken about that.

COURT: That is the same question.

Q. Did you see any men, any other persons, around there that morning?

A. I could not say that I did. I might have seen them but it was not impressed on my mind.

Q. Did you see any one else on the bank of the river at that time?

A. There might have been. It was not impressed on my mind that there were. There was not any reason for me to remember it, and I can't say that there was or was not.

Q. On the morning on which you say that you saw this man on the bank of the river taking his shoe



off, did you look to see whether there was any staging between the coffer-dam and the bank of the river?

A. I did not look at that particular time to see whether there was any staging.

Q. When did you particularly look and see whether there was a staging?

A. I possibly noticed every time I was on that pier because I had to climb around there a good bit myself to verify our points on there. And staging would have helped me considerable had it been there. That is, in my climbing around I have to go places where no one else has to go.

Q. Staging running from the coffer-dam to the bank of the river would have helped you if it had been there, would it?

A. Merely in reaching the point that I wanted to get to more conveniently.

Q. Yes, it would have been more convenient for you if there had been one there?

A. For my own personal use, yes.

Q. And that is why you looked to see if there was any there?

A. That is why I noticed that there was no staging around there at any time that I worked there.

Q. Now, when was it that you noticed that?

A. I noticed it every day during all the time we worked on that pier that we never had any staging there.

Q. Now, you say there were logs extending out from the riprap on the bank of the river into the river towards the west, did you?



A. Towards the west, yes.

Q. How many logs did you notice were extending from the riprap into the river?

A. I know that at the southeast corner of the pier there were logs extending out there because we would get our boat up back around there to get on the pier in another way, to get to the top of the pier in another way, so I noticed those logs. Then from being there so often I noticed other logs back further in the bank and know the condition of the bank, and noticed the logs that they had down there.

Q. Did you notice particularly that that was the only place where there was any log extending out from the riprap work into the river?

A. Not that that was the only point. There were more points than that where logs stuck out.

Q. How many points along the East side of this coffer-dam would you say you saw logs sticking out of there?

A. Well, at some point or other on the bank there are probably logs sticking out there all the way along the bank.

Q. And that whole extent of the coffer-dam?

A. The entire length of the coffer-dam; however, not down close to the water. Some of them are up higher in the bank, as high as 20 feet.

Q. The whole length of the coffer-dam the logs were extending out?

A. At some point or other on the bank.

Q. Did you notice the distance—or how near that

these logs would come to the coffer-dam?

A. No; not to say exactly.

Q. Well, you never took any measurements to see whether they were two feet, three feet or four feet, did you?

A. No. No, I did not.

Q. They might have been within two feet for all you know?

A. Could not have been within two feet, for the reason that I said, or I believe I said, we got our boat around in there, to get on the pier in another way.

Q. Well, now, on this day on which you saw this man sitting on the bank of the river, you say that there was water along in here?

A. That is land where you have your pencil there now.

Q. That where the "G" is?

A. Yes, that is all land.

Q. You are positive of that?

A. Very positive.

Q. But you never walked from the coffer-dam on to this land, did you?

A. Many times.

Q. I mean on this day on which you saw this man sitting.

A. I possibly did it on that day.

Q. On that day?

A. Possibly did. I would not say positively, but it is very probable I did.

Q. You would know positively if you walked on the land from the coffer-dam on to the bank of the

river? You know positively there was no structure here or platform for a man to walk on from the cofferdam on to the bank?

A. I do know positively that there was no structure there of any kind.

Q. That was in November, 1911?

A. That applies to a special time, covering probably two months there.

Q. Well, I mean the day on which you saw the man sitting on the bank of the river, which you said was in November, 1911.

A. That applies to that day also.

Q. How near to the shore line did the riprap work come on the bank on the side of the river?

A. Some of it was directly at the shore line. Some of it was—considered in a horizontal plane would be any number of feet, from 10 to 25. As I explained before, it was in various positions on the bank; not all of it on the shore line, nor all of it above the shore line.

Q. Well, did it slope up about like that?

A. The bank was very steep slope—what is known as about one to one slope, or 45 degree angle.

Q. How deep was the water here where this float was?

A. Where the float was extending from the shore line out—never having made any soundings I could not say positively.

Q. You don't know?

A. No, I don't know.

Q. How deep was the water here at the pier, the

north pier?

A. At the corner of the north pier?

Q. No. Over here at the south part of the north pier. How deep was the water there?

A. If you ask me to say positively I can only say that I didn't make any soundings there and I don't know.

Q. You don't know?

A. No.

Q. How deep was the water here, if you know, at the south pier, at the north portion of the south pier?

A. There was not any water at the northeast corner of the south pedestal. That was land.

Q. There was not any water here at all?

A. There was not any water there at all.

Q. Then according to your diagram here, this was all land in here?

A. That is water. I stated the northeast corner of the south pier, which is where you say.

Q. That was water?

A. That is water.

Q. Oh, that is water in there. And the land came, extended right up to the coffer-dam where these lines are that you speak of?

A. The shore line shows the extent of the land there.

Q. And a man could step right off the coffer-dam on to the land here and walk over on to the shore, couldn't he, without getting his feet wet?

A. When he stepped on to the land he was on the

shore.

Q. He could do that without getting his feet wet?

A. He could do that without getting his feet wet at that point, yes.

Q. That was along in November, was it, or December?

A. That was in November that he could do it, and October; there is a space of probably 2 months, as I said there.

Q. Well, beginning with what time—October and the last part of September?

A. Well, probably say beginning around the 10th of October, as near as I remember.

Q. Tenth of October?

A. Near there somewhere. I can't say positively.

Q. Prior to that time there was water here, then, was there?

A. Well, not—of course, as I said before, the shore line changed.

Q. Of course. But I say prior to the 10th of October—you want the jury to understand that the shore line was not as it is here?

A. Prior to—yes. I didn't get your word.

Q. Prior to that time?

A. Yes.

Q. And there would be water there, wouldn't there?

A. Yes. Not at all times, but—

COURT: Let me see that.

Mr. SENN: I would just like to ask the witness one question.



Mr. GILTNER: I am not through with the witness yet.

Mr. SENN: Oh, I beg your pardon.

Q. You stated that you made no notes at that time in your own handwriting as to the height of the water at the point between the two piers and the coffer-dam, did you not?

A. I did.

Q. And you made this drawing from notes made by somebody else at that time?

A. Yes; although possibly some of them were my notes. I could not say.

Q. Well, now, I want to know positively whether they were in your handwriting and you made them.

A. No, it would be better to say that they were not notes made in my handwriting, and that I made them.

Q. Those notes were made by actual measurements over there of the water, or did you go to the civil engineer's office, the city engineer's office to get them?

A. Well, we—the height of the water was noted if there happened to be an omission in entering the fact into our notes, why, the Government office was consulted in regard to the height of the water at that time.

Q. But you didn't go and measure the water there yourself, did you?

A. No.

Q. And you never made any notes from any measurements that you made?



A. No.

Mr. GILTNER: I move, if the Court please, to strike out that portion of his testimony wherein he states that he made this. He never measured the water there. Whatever was made was not made from his notes—might possibly have been made, but he doesn't know—but was made from what he got down here at the Government office, as not being the best evidence, as not being the best evidence and being hearsay, and not proper to come before this jury as to what the height of the water was there at that time.

Mr. SENN: Your Honor understands that this is simply introduced as a matter of illustration. If he has any witnesses who want to contradict it, they have that right. We have a perfect right to have him illustrate. There is no question that that is not accurate either.

Mr. GILTNER: I am not going to argue this question to the Court. I merely make the motion to your Honor.

COURT: I overrule the motion.

Mr. GILTNER: I save an exception to the ruling of the court.

COURT: Is that all on cross-examination?

Q. On the day on which you saw this man sitting on the bank of the river, did you see anybody else there?

A. It was not impressed on my mind. There might have been, and there might not have been. I can't say that I saw anybody there.

Q. If there had been any number of men there

you would have remembered that, wouldn't you?

A. It is very probable that I would, yes.

Q. How far away were you from this man when you saw him?

A. About 20 feet.

Q. Were you coming down the steps and going on to the float when you saw him, or where were you when you saw him?

A. I was coming down the steps and coming on to the float.

Q. And that is when you were going to work?

A. When I was going to do the particular piece of work which I explained before was necessary on pier 5 at that time.

Q. Had you been up on top of the bank—away up on top?

A. Yes.

Q. And you came down there at that time and that is the time you saw him?

A. Yes.

Q. At the time you saw him, did you get on to the float then and go on over on to the coffer-dam?

A. I stepped on to the float and got from the float into our boat and went to pier 5.

Q. Then you were right up next to this coffer dam when you got into the boat?

A. I was.

Q. Was there anything there to attract your attention. Suppose there had been a steam engine or a donkey engine working there, would you have known it?

A. No. I would not have noticed it particularly. It is not unusual to see them around different points on the bridge.

Q. Well, if there was a donkey engine working, wouldn't you have noticed that? Wouldn't you have heard the noise of the donkey engine working there?

A. I would have heard it, but it would not have impressed itself on my mind because it is a very familiar sight.

Q. Then you haven't any map the same as that in your original records, have you?

A. We have not.

Q. I wish you would bring into this court these original notes and produce them here by 12 o'clock, if you can, from which you made this.

A. That would be impossible for any man to do.

Q. You can't do that?

A. I can not.

Q. Who asked you to make that map?

A. Mr. Alexander.

Mr. SENN: We object to that as having been gone over.

Mr. GILTNER: No, I have not asked him that.

Q. Who asked you to make that map?

A. Mr. Alexander.

Q. What were you paid for making that?

A. I have not—

Mr. SENN: Objected to as irrelevant.

COURT: I think that is objectionable.

Q. I will ask him if he was paid anything for making it.

COURT: I think that is objectionable. He has a right to be paid for making it.

Mr. GILTNER: Save an exception to your Honor's ruling on that question. I want to test the witness's credibility by that question. And we have a right to search his heart in regard to these matters. That is all I ask.

COURT: The objection will be sustained.

Mr. GILTNER: Save an exception to your Honor's ruling.

COURT: Very well. You have a right to except.

Mr. GILTNER: Now, at this time I make a motion that the testimony given by this witness as to this map and as to the shore line and the height of the water be stricken from the records of this case, and ask the Court to instruct this jury that they should disregard that testimony for the reason that this witness has testified that the evidence that he has given here in regard to this map and in regard to the height of the water is evidence from original records that he did not make, and which he says it is impossible for him to produce here at this time.

Mr. SENN: Well, the Court ruled on that once.

Mr. GILTNER: Not that feature of it.

COURT: I don't think it is necessary to argue it. The Court will overrule the objection.

Mr. GILTNER: Save an exception to the ruling of the Court.

COURT: I understand you have offered that map, have you, in evidence?

Mr. SENN: Yes, I will offer it.

COURT: Only for—

Mr. SENN: Matters of identification and explanation.

COURT: Well, as explanation.

Mr. GILTNER: The positive evidence went before the jury.

Mr. SENN: If it is incorrect he can get any number of witnesses to testify to it if he wants to.

Q. How long did it take you to make that map?

A. In hours and minutes you mean how long?

Q. Yes. How long did it take you to make that map?

A. Oh, an hour or an hour and a half, possibly two hours, to do the actual drawing—make the actual lines of it.

Q. How long did it take you to get the data with which to make it?

A. Well, that was a matter of days, of several days, to get that, because it was in various places.

Q. It took you several days?

A. Yes.

Q. Have you got your notes? Did you write out any notes from the original records?

A. No, I did not. I made them on pieces of scratch paper, or something just to use in connection with the making of the map.

Q. Where is it? Where is your original—where is that scratch paper?

A. Probably destroyed. I don't know. After I got it on the map I don't know what I did with it. I probably threw it in the waste basket.

Redirect Examination.

Mr. SENN: I just wanted to ask him one question. Did you put any date on this map?

A. I did.

Q. I wish you would read that date.

A. October 2, 1911.

Q. Is that when the drawing was made, as of that date?

A. The drawing was made of the condition of the work as at that time.

Q. As of that date?

A. Yes.

Excused.

C. H. WHEELER, called for the defendant, having heretofore been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. SENN:

Doctor, you have already been sworn. Did Mr. Moore make a statement to you after the accident as to how it happened, or where he was hurt?

A. I am hazy on that question at the present time. It seems to me—

Mr. GILTNER: Just a minute. You can answer that question yes or no, Doctor. I can't hear very well.

COURT: He said he was hazy on that question at the present time.

Q. Well, I will ask you this question, Doctor. In the other trial, when the question was asked you by Mr. Spencer, whether you didn't answer as follows:



“As I understand you, Doctor—”

Mr. GILTNER: If he is going to undertake to impeach his own witness, if that is what he is trying to do, I object to it, for it is improper.

Mr. SENN: I have a right, your Honor, to refresh his memory on that point.

Mr. GILTNER: Then you have a right to show him—under our statutes you can’t impeach your own witness unless you show you are taken by surprise.

COURT: This is not an attempt to impeach his witness, as I understand it. He wants to refresh his memory.

Mr. GILTNER: Well, then, let him see it, without making any statement to the jury.

Mr. SENN: I have a right to introduce this testimony in evidence if I want to.

Mr. GILTNER: I don’t think he has.

COURT: We will consider that when the question is raised.

Mr. GILTNER: Before the Doctor testifies to anything, if there is anything in writing here, I think the Doctor is entitled to see it, and I object to his reading anything before this jury.

COURT: He is entitled to see it if he calls for it. And it is not necessary for the attorneys to instruct him. You may proceed, Mr. Senn. You are taking up a good deal of time.

Q. Whether at the other trial, when the question was asked you by Mr. Spencer, as I understand you, Doctor, he told you he stepped on a board that had a nail in it. That is the way you recollect it, and your

answer was, "Yes, I believe the nail was up so as to drive in his foot." Do you know whether you testified to that?

A. I think that is the substance of the testimony. Whether it is the real wording or not I do not know.

Mr. GILTNER: What is that?

A. I say I think that is the substance of the testimony, but whether it is the real wording of it, I can't recall. It is a long time to remember, two years.

Q. And in answer to the following question asked you by Mr. Giltner: "Q. Doctor, will you state, in your judgment, did Mr. Moore tell you what was the cause of the puncture in the sole of his foot?" "A. Well, as I remember—"

Mr. GILTNER: Well, now, before he calls his attention to that, it is proper to ask him the question if he remembers what he answered to that question.

COURT: Well, he may ask him that. You can put that question to him. Ask the witness if he remembers.

Q. Do you remember that question, Doctor, from Mr. Giltner?

A. No. No, I could not remember the testimony, the questions and answers.

Q. Do you remember a question in substance like that?

A. There may have been a question answered, but of course it didn't—I have too many other things to remember.

Mr. GILTNER: Let's see this. Is this the Doctor's testimony?

Mr. SENN: That is the Doctor's testimony.

Mr. GILTNER: Where is this you have read? I want to see it. Just mark it.

Q. Now, you read this question to the Doctor, and you said in response to a question Mr. Giltner asked—

Mr. SENN: Yes.

Mr. Giltner: Isn't it a fact that this testimony here shows it is direct by Mr. Spencer, and not by Mr. Giltner?

Mr. SENN: You called Mr. Wheeler. That is your own question; then when the answer came out you didn't like it.

Mr. GILTNER: Now, I object to his making a statement of that kind, whether I liked it or not. To show you that I had no objection to that at that time, I am willing to read the Doctor's answer to this jury, to that question, this last question that he stated.

COURT: Very well. Read the answer.

Mr. GILTNER: "A. Well, as I remember, he said he jumped on a board containing nails, the puncture went through the sole of his foot, the sole of his shoe, and into the bottom of his foot." I have no objection to that.

COURT: I guess there is no question but what the man was injured in that way.

Mr. SENN: That is all, Doctor.

Mr. GILTNER: That is all, Doctor.

Excused.

ARTHUR NELSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SENN:

Mr. Nelson, where do you live?

A. I live at 102 Cook Avenue.

Q. Here in Portland?

A. Yes.

Q. Whom are you working for?

A. Now?

Q. Yes.

A. At the present time I am not working for anybody.

Q. You are not in the employ of the Union Bridge & Construction Company at the present time?

A. Well, I have been this winter.

Q. This winter, but not now?

A. No.

Q. Were you working for the company at the time Mr. Moore was hurt on October 2, 1911?

A. Yes.

Q. What was your job, Mr. Nelson?

A. Well, I was machinist.

Q. Machinist. And what were your duties as such?

A. Well, I was looking after all the pipes and shafts on the air work, on the center.

Q. That is, you looked at the pipes and the air?

A. Yes.

Q. Did you see the accident to Mr. Moore?

A. No.

Q. You don't know how he was injured?

A. No.

Q. You know the conditions of the place down there, about the time they took the pipes out of pier 7?

A. Yes, sir.

Q. How do you know that?

A. I was around there and working there, taking the old pipes and shafts off.

Q. You were the machinist on the job?

A. Yes, sir.

Q. Was it your duty to take those pipes out?

A. Yes, sir.

Q. What kind of pipes were those?

A. They were 3 inch and 4 inch blow pipes and they had beam shaftings and had a bucket running up and down.

Q. How heavy were the shaftings?

A. Five or six hundred pounds, maybe heavier.

Q. How did you take them out?

A. Always used a derrick.

Q. Always used a derrick?

A. Yes, sir.

Q. I will ask you to refer to defendant's Exhibit 1.

Mr. GILTNER: For the purpose of saving the record, I move that this map be stricken from the records in this case and that this witness not be permitted to testify to it for the reasons I have already given in regard to the testimony of Mr. Holmes, for the reason it is hearsay testimony—just for the purpose of preserving the record.

COURT: The motion is overruled.

Mr. GILTNER: Save an exception.

Mr. SENN: Mr. Nelson, if you will just stand here in front of the jury.

Q. Now, Mr. Nelson, assuming that this is pier 7, as has been testified here to, and this place coming down here is a stairway, I will ask what this stairway here represents.

A. That is to go up and down.

Q. From the East side?

A. Yes, sir.

Q. And what is this along here marked "Float?"

A. That is the float.

Q. Where was the float anchored?

A. It was anchored to the casing.

Q. Of the coffer-dam?

A. Yes, sir.

Q. Was it necessary to tie it because of the current or tide?

A. Yes, sir. We tied it right to the bank closely.

Q. This would be down stream this way, and it would take the float over here?

A. Yes, sir.

Q. Now there is a place here marked "H," which is designated as a ladder. Where did that ladder go?

A. It went up on top.

Q. To the top of this pier?

A. Yes.

Q. How high was that pier?

A. I don't remember exactly. About 25 feet or something—

Q. Who used that ladder?

A. The engineers.



Q. How often would they use the ladder?

A. Oh, two or three times a day, or more.

Mr. GILTNER: I don't see the relevancy of this testimony, if the Court please.

COURT: I suppose they are trying to show that is the regular way to get out.

Mr. SENN: Yes, your man testified the float was not against here—it floated out.

COURT: Mr. Senn: There is an objection made—what is the purpose of that?

Mr. SENN: It is proper, your Honor, to show the conditions there, and not only that, to show—Mr. Moore stated that this float was floating around here in the river, and that he went out on the coffer-dam and got from the coffer-dam into a skiff. Now, our testimony is to the effect that this float was right against the coffer-dam; that men walked down the stairway on to the float and then on to the coffer dam.

COURT: You can show that.

Mr. SENN: And our testimony later on will show that he went down there too.

COURT: Very well.

Q. Now, you say that at the time of this accident or thereabout, October 2, 1911, you helped take out those pipes?

A. Yes, sir.

Q. Just state to the jury what you did.

A. Well, I disconnected the 4 inch pipe.

Q. What did you do?

A. I disconnected all them pipes.

Q. That is, you went down there and disconnected

them?

A. Yes, sir.

Q. And then what was there to be done?

A. To carry them away.

Q. How were they taken out of there?

A. The 4 inch pipe and 3 inch pipe I carried away myself.

Q. You carried them away yourself?

A. Yes, sir.

Q. What did you do with the other larger pipes?

A. I left them to the gang. I disconnected them, took the nuts and bolts off, left the rest of it.

Q. How did they get them out of there?

A. With the derrick.

Q. Where was this derrick laying?

A. Well, I tell you I can't exactly remember if it was there that day or not, but all I had to do was disconnect it. That is all I had to do.

Q. You don't know where the derrick was?

A. No, sir.

Q. Do you know whether or not they raised those pipes out with the derrick?

A. I only think they did because they were laying on the front of the barge.

Q. Where was the barge?

A. It was there.

Q. Do you know anything about the stage of the water there at low water along in October and November?

A. I don't remember.

Q. Do you know whether at any time there was a

shallow here back of the piers?

A. Yes, sir, at low tide.

Q. How do you know it?

A. At low tide, for I was working around there.

'Q. Whereabouts—on the other side of the piers and coffer-dam from the bank, that is at the place marked "D?"

A. Yes, sir.

Q. How do you know that?

A. Stuck there myself.

Q. Did your scow ever get stuck on the ground?

A. Yes, sir.

Objected to unless it is limited to the 2nd day of October, 1911.

Mr. SENN: It has some value, your Honor.

COURT: We are examining with reference to that date, and I think this is approximate to it. The objection will be overruled.

Mr. GILTNER: Save an exception to the ruling of the Court.

COURT: Very well.

Q. Did you ever have any trouble with your scow getting stuck out here?

A. Yes, sir.

Mr. GILTNER: Same objection.

COURT: Very well. Same ruling.

Exception allowed.

Q. What is the fact, Mr. Nelson, as to whether one of these piers was on land, or in here marked "G?"

Mr. GILTNER: I object to this testimony as leading. He can testify as to the conditions of this prop-

erty here and of this land, if he knows, on the 2nd day of October, 1911. That is the day on which we are investigating this transaction. It may take me two hours to cross examine this man if he is going into this at length, and the questions are leading, and I wish he would confine himself to the day of the accident.

COURT: The objection is overruled.

Mr. GILTNER: Save an exception to the ruling of the Court.

Q. What was the fact as to whether or not there was land in here marked by letters "G" during October and November, 1911, and at about the time you took out these pipes?

A. All the dirt we took out from inside the sink was dumped around it.

Q. Was dumped around this coffer-dam?

A. Yes, sir.

Mr. GILTNER: Which side?

Mr. SENN: Was that at the places marked "G" where I am pointing to with that pencil?

A. Dumped on both sides.

Mr. GILTNER: Just a minute. Do you think this is fair for him to answer and testify on this side, when the witness has already said on the other side?

Mr. SENN: He didn't say that. I have referred to these as the letter "G."

COURT: He has a right to call his attention to the places, to the locality, and ask the question.

Mr. GILTNER: That is all I have to ask of him.

COURT: The objection is overruled.

Mr. GILTNER: I save an exception.

COURT: I think you will have to curtail yourself a little on your objections. You are taking up a great deal of time of the court here, and the court wants to get through with this case.

Mr. GILTNER: So do I, your Honor. I don't want to take up time. We can get through by his telling about it without him pointing to it.

Q. Mr. Nelson, I am pointing now to the letter "G" which is on the east side of this bank and near the east end of the coffer-dam, of pier No. 7—what was the fact as to whether ground was visible on or about October 2, 1911, and on or about the time that you took these pipes out here?

Mr. GILTNER: I object to that as a double question. I would like if you would put one question at a time.

COURT: That objection is frivolous and the Court will overrule it.

Mr. GILTNER: All right.

Q. What did you say about that?

A. All the dirt that was around there was taken out there from inside the cribbing when they was sinking it.

Q. When you were sinking this cribbing?

A. Yes.

Q. What did you do with the dirt?

A. Dumped it on that side, and some on this side—dumped the dirt on both sides.

Q. What is the fact as to whether there was dirt in here marked with the letter "G?"



A. Well, of course, there was low tide—the dirt showed up at low tide. Sometimes there was lots of water in here, right in here. I used to have a skiff around this way too. At low tide you could walk all around it.

Q. Walk all around the letter “G’s?”

A. Yes, sir.

Q. Now, supposing, Mr. Nelson, there had been some loose planks thrown in there, that were not nailed or spiked, and high tide had come in here, high water, what would become of these planks?

A. Could not get up to this float, this stairway.

Q. Went around there?

A. This float was in the water. You could not get out. You could not get on the river at all.

Q. What was being done with this form lumber that was taken off these piers?

A. Thrown down all around here—some piled up on the bank.

Q. At the time of this accident, Mr. Nelson, on or about October 2, 1911, and at the time you were taking these pipes out, what were you doing as to whether you were cleaning up there and moving out?

A. We was around both 5 and 6. Between we had to go over here and disconnect pipes and shafts. Then I had to look after the air, keep it in running order, so I used to be on this pier maybe five minutes, maybe three or four times an hour, and then on the other one—back and forth, all the time.

Q. Did you ever see any staging between this coffer-dam and the bank?



A. No, sir—only that float.

Q. It was the regular way for the men to get out on the coffer-dam?

A. Well, this float was up against the coffer-dam, so you could just step on the corner.

Q. How wide was this coffer-dam?

A. 15 or 20 feet.

Q. I mean the sill on it?

A. 12 inches.

Q. You had 12 inch spaces to walk around here on it?

A. Yes, sir.

Q. That was a sill laid right down?

A. Yes, sir.

Q. How high was it above the water?

A. While we was working we had it high enough to keep the water out on this side.

Cross Examination.

Questions by Mr. GILTNER:

Mr. Nelson, when they started in—do you know when they started in, the day on which they started in to take the gravel out of the coffer-dam, Mr. Nelson?

A. I don't remember.

Q. Do you know whether that was in October or November?

A. I don't remember at all the date.

Q. Were you present on this coffer-dam on the day on which Mr. Moore was hurt running the nail in his foot?

A. I think I was there in the morning, but I don't remember of it. I know when he was hurt I was out on pier 5.

Q. You were not over there at all?

A. No, sir. I was there maybe just before, maybe after.

Q. When did you first hear of Mr. Moore being hurt?

A. I heard right the same day—perhaps five minutes after.

Q. Now, you state the day on which Mr. Moore was hurt, then, this coffer-dam was filled with gravel, was it not?

A. No, sir. It was not. The gravel was outside.

Q. Well, you had taken the pipes out the day on which he was hurt, had you?

A. Yes, sir. I was going to take them out, some of them, and he was going to shovel gravel away.

Q. I know. But wasn't there a pipe about here in the coffer-dam, about 16 inches in diameter—one near the north pier and one near the south pier?

A. We had about three or four pipes there, and one right there.

Q. Well, now, the day on which Mr. Moore was hurt—do you remember the month that was?

A. I don't remember the month.

Q. Well, the day on which you took your pipes out, 3 and 4 inch pipes—do you know what month it was in?

A. It was in October.

Q. What time in October?

A. Well, I don't remember. I didn't pay any attention to it. I had to be all around, so I didn't pay any attention to it.

Q. Well, I understand that. Well, now, there was a 16 inch in diameter pipe here, you say?

A. Yes, sir.

Q. And one here?

A. Yes, sir.

Q. Do you know when they were taken out?

A. Well, we was going to take them out—when I had them disconnected. I had to take the nuts and the bolts. That is all I had to do. I left it to the other gang to take them out.

Q. Did you see Mr. Moore there that day?

A. I seen him around there, but I didn't pay any attention to it, you know.

Q. Did you see him? You know Mr. Moore?

A. I know him.

Q. Did you know him before this accident happened?

A. I knew him around the work, yes sir. I knew who he was.

Q. Did you know him to speak to?

A. Yes, sir. I knew who he was.

Q. Did you see him on that morning, that day?

A. I didn't pay any attention to it.

Q. You didn't pay any attention to who you saw there, did you?

A. No, sir.

Q. These 3 and 4 inch pipes, on what day were they taken out?

A. I can't exactly remember.

Q. Were they taken out before or after the 16 inch pipes were taken out?

A. They were taken out before.

Q. How many days before?

A. Well, I can't remember.

Q. About how many, would you say?

A. Maybe 2, 3 or 4 days.

Q. Two or three days?

A. Yes.

Q. And did you see them trying to take out these pipes—these 16 inch in diameter pipes on the day on which Mr. Moore was injured?

A. Well, I can't remember. I had to go and disconnect it and have it ready. I suppose he was around on the work. He always had to take them away, the dirt—

Q. Did you see Mr. Moore there that day?

A. I can't remember seeing him. I didn't pay any attention to see him. I was attending to my work.

Q. What was the height of the gravel in this coffer-dam on the day on which they were taking out these 16 inch in diameter pipes?

A. The height of the gravel?

Q. Yes.

A. Well, there was some gravel around one pipe, and then there was water around one of them.

Q. Did you see the men shoveling gravel in this coffer-dam on that day?

A. I can't remember. That was not in my line at all. They had to have them ready for me when I got

over, so I don't remember.

Q. You didn't see what was done there until after they got ready for you?

A. No.

Q. Do you know what time of day they did get ready for you?

A. No. I don't remember.

Q. It is too long ago for you to remember?

A. Yes, sir.

Q. Would you say that during the month of October water would come up all along this coffer-dam here, when it was high?

A. Sometimes.

Q. And then sometime in the day there would be no water there at all?

A. It would go down.

Q. It would go down and come up?

A. Yes, sir.

Q. Now, did you see any logs projecting out from the bank of the river towards this coffer-dam?

A. Yes, sir, I did.

Q. Whereabouts?

A. Over here.

Q. And where else?

A. I don't remember any other place.

Q. That is the only place you noticed?

A. Yes, sir. There is all kinds of old lumber sticking out on the bank all over.

Q. Would you say that—did you notice on the day on which they took out, or were taking out, these 16 inch pipes whether there was any water here or not?

A. I don't remember.

Q. You don't remember that?

A. No, sir.

Q. There might have been water there, for all you know?

A. Well, there was water some places along here. And there was gravel too. I didn't pay any attention to that. I didn't have time enough to stop and think about that.

Q. You never paid any attention. Did you ever have any occasion to go over on the bank of the river at all?

A. I walked on old lumber around.

Q. Where did you walk from, from the coffer-dam?

A. On just this walk.

Q. From the float?

A. Yes, sir.

Q. Did you walk from the coffer-dam over to the bank of the river at any time?

A. Yes.

Q. Whereabouts?

A. Over here. Here was some gravel. Here was some boards.

Q. That would overflow with water sometimes, would it?

A. Yes, sir.

Q. Then you walked from near the middle of the coffer-dam on lumber over on to the bank of the river?

A. Walked over here some place.

Q. Well, over down here?



A. Yes.

Q. Down near the south pier. Well, now, about how near the pier was this lumber piled in here that you say you walked on?

A. Oh, I can't remember. It was not piled. It was thrown all around.

Q. And how often did you do that?

A. Only when I had to go over there and do something.

Q. Well, when you did that, there must have been water then along in front of the coffer-dam.

A. There was water around here.

Q. But if it had been dry land, you would have walked on the land, wouldn't you?

A. Yes, sir.

Q. Now, do you know, you say you don't know, the condition in front of the East part of the coffer-dam on the day on which Mr. Moore got hurt, do you?

A. No, sir.

Q. You don't know whether there was any lumber there, or whether there was any staging there or not, do you?

A. Well, I know it was old lumber in around. There was no staging at all.

Q. But you stated you didn't look.

A. Well, I didn't look. I know there was old lumber.

Q. But you didn't look on that day, did you?

A. I am sure I looked when I walked on there.

Q. Well, did you walk on that day over on to the

bank of the river, when he was hurt?

A. Yes, I was there in the morning, working around. I had some gravel and stuff in the way one pipe, and then the other was water.

Q. I mean on the day Mr. Moore was hurt.

A. I don't remember that day, at all.

Q. You don't remember that day at all?

A. No.

Q. Then you don't remember whether you walked on the shore on the day on which he was hurt, or not, do you?

A. Well, I was over there. It is kind of hard to remember.

Q. Well, you don't remember whether you did or not?

A. I didn't pay any attention to the date. I walked and things like that.

Q. That is what I want to know. That is what we are trying to get at. On the day on which Mr. Moore—I asked you that question. Mr. Nelson, where were you on the 10th day of December, 1912?

A. I think I was in southern Oregon.

Q. Where?

A. Away down in Southern Oregon.

Q. Southern part of the State?

A. Yes, sir.

Q. When did you work for this company last?

A. I worked all winter.

Q. All winter?

A. Yes, sir.

Q. Under Mr. Alexander?

A. No.

Q. Whom?

A. Mr. Willard.

Q. And he worked for Mr. Alexander, for the defendant company?

A. No, he was in another place. Mr. Alexander was not in Portland.

Q. I know, but it was for the same company.

A. Yes.

Q. Are you in their employ now?

A. No.

Q. How long have you been working for them?

A. I have been working about four years.

Q. Steady?

A. Yes, sir.

Q. And whenever they have any work to do, you generally work for them don't you?

A. Yes, sir.

Q. Are you engaged to do any work for them in the future?

A. I might.

Q. Well, but not you might. Are you engaged? Are you going to do any work somewhere, and are you going to work for them?

A. No. Not that I know of.

Mr. SENN: I object to this, taking up the time of the Court.

Q. What?

A. No.

Excused.

GEORGE F. CLARK, a witness called on behalf

of the defendant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SENN:

Mr. Clark, where do you live?

A. I live in Brantwood Addition, Portland, Oregon.

Q. How long have you lived there?

A. About three years.

Q. Were you working for the Union Bridge & Construction Company on the Broadway Bridge October 2, 1911, about the time Mr. Moore was hurt?

A. Yes, sir.

Q. What was your business?

A. I was hoisting engineer.

Q. Hoisting engineer. As hoisting engineer, what was your duty?

A. Well, I ran the derricks.

Q. What is that?

A. Derricks—handled derricks, different derricks, and being on barges and on shore.

Q. Were you familiar with the conditions down there about the time Mr. Moore was injured, on pier 7 particularly?

A. Well, I couldn't say that I was especially on that date.

Q. Do you know the position of the float there, and the barges, and the stairway?

A. Well, I know the position of the stairway and float, but the barges, I couldn't say as to that.

Q. State whether or not the float was anchored against the coffer-dam.

A. Well, at that special day I couldn't state if it was; but then it was supposed to be there, because I had occasion to use that float about twice a day.

Q. How did you get across the river?

A. By boats.

Q. And would you use the float for that purpose?

A. We would have to come down on the float in order to get on the boat—if you were at that point.

Q. Was there any ladder running from the float up to the top of the pier?

A. Yes, sir.

Q. Who used that ladder?

A. Why, it was put there for the civil engineers to use, as I understand it. There was nobody else had any occasion to use it.

Q. Do you know of any staging having been built from the coffer-dam to the east bank of the river?

A. Why, not anything of a permanent nature, I don't know of anythink ever having been put there. It might have been, but I would not have known it.

Q. Did you ever see any there?

A. No, I never saw any permanent staging there.

Q. Did you have anything to do with getting these pipes out?

A. No, nothing at all to do with getting those pipes out.

Q. On the west side of this coffer-dam, pier 7, did you ever have any trouble getting a scow stuck there?

A. Well, we have at times when the water was

low, the nose of a scow would set in—say this is the opening between the two piers, we would pull a scow in—

Mr. GILTNER: I object to this testimony unless it is confined within some reasonable time of the happening of this accident. I don't think it is competent testimony.

COURT: I will overrule the objection.

Mr. GILTNER: Save an exception.

Q. I wish you would just step in front of the jury, Mr. Clark. Referring to Model 1, in Defendant's Exhibit 1, which appears to be a down view of pier No. 7 and the coffer-dam, showing the shore line, and the float, and the stairway, and the letter G appearing to show ground, state whether or not at times during October and November, 1911, there was ground from the coffer-dam to the bank.

Objected to as incompetent, irrelevant and immaterial, and not confined to the time within which this accident happened.

COURT: I understand the accident happened on the 2nd day of October, 1911?

Mr. GILTNER: Yes, sir. And it is very easy for him to ask him that question. If he knows, he can testify to it.

COURT: It ought to be confined to about that time.

Q. On or about October 2, 1911, at the time you were taking these pipes out, and at the time Mr. Moore was injured?

A. I couldn't say on that day. I had occasion to



use that quite often, I would have occasion to go on this work, but on that especial day, I don't know. I remember of Tom getting hurt, but I don't know; but at this special date, of course, I would hate to say. I was on and off that building and across that float, say going on and off that float an average of twice a day.

Q. Did you ever see any dry land from the bank out to the coffer-dam?

A. Yes, I have seen dry land, so it was possible to step off from the cribbing to the coffer-dam to the bank.

Q. There has been some testimony here, Mr. Clark, about a log projecting out. Where was that log projecting out?

A. I cannot say exactly what the position of that log was. There was a log sticking out of the bank, as I remember, and there were times when we were working there that it was necessary, you know, for a man to walk around this bank. It was irregular shape. And along about where the south pedestal is there was a log projecting out from this bank, that stuck up some distance up in the air, and towards the pier; but then I couldn't exactly state the location.

Q. When you refer to the south pedestal, do you refer to B?

A. Yes, sir.

Q. That would be the one that is up opposite the float?

A. Yes, up opposite the float.

Cross Examination.

Questions by Mr. GILTNER:

Then, Mr. Clarke, on the 2nd day of October, 1911, you are not prepared to state what the condition of the water was in front of this east part of the coffer-dam, are you?

A. Well, no, not accurately; not at that particular date, I wouldn't state.

Q. The water would rise and fall there, would it not?

A. It would fall and rise all along the river, yes, sir.

Q. Were you there on the 2nd day of October? Do you remember whether you were there on the 2nd day of October?

A. I wouldn't state specifically that I was there on that date. My work was not especially around that pier any more than it would be around others; and I was first one place and then another.

Q. What were you—a donkey engineer?

A. Yes, sir.

Q. And you had charge of a barge, or donkey engine on a barge?

A. I was on no special engine. I would be first on one and then on another; and I have worked around this pier.

Q. Did you have anything to do with pulling these pipes out of here?

A. No, I didn't have anything to do with taking those pipes out.

Q. You don't know whether you were there on

the 2nd day of October or not? You wouldn't swear positively?

A. No, I would not swear positively whether I was there on that date or not.

Q. Now, another thing, Mr. Clark, this float here—this rope sometimes would be tied closer, and this float would be nearer? It swung from and towards the coffer-dam, did it not?

A. It might have been some nearer up and down; I couldn't state.

Q. It was tied with a rope?

A. Well, the end would extend out in the river; it swung around.

Q. Was there ever any time when the float was further away from the coffer-dam than others? Did you ever notice that?

A. It is possible there might have been, further away than others.

Q. Then, if it was further away from the coffer-dam, why, there would be a little slack in the rope, wouldn't there—have to be?

A. Oh, yes, there would be a little slack in the rope.

Q. Do you know the length of the rope?

A. No, I don't. I never paid much attention to anything like that.

Excused.

Recess taken until 2 P. M.

W. J. CHALFAN, a witness called on behalf of the defendant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SENN:

Mr. Chalfan, where are you working at the present time?

A. No place, sir.

Q. Where have you been working in the past?

A. Seattle, lately.

Q. And for what company?

A. International Contract Company.

Q. Did you ever work for the Union Bridge Company?

A. Yes, sir.

Q. Did you work there at the time Mr. Moore, the plaintiff, was hurt?

A. I did.

Q. What kind of work were you doing?

A. We were tearing off, cleaning up, principally around the pier on the East side at the time.

Q. You were cleaning up at the time he was hurt?

A. Yes.

Q. How many men did you have there?

A. Well, I don't know—some five or six; possibly more.

Q. Were you the boss of the men?

A. Yes, sir.

Q. How long had you been working there when Mr. Moore was hurt?

A. Working at this place?

Q. Yes.

A. Well, I disremember now. It might have been one day; maybe two; maybe more.

Q. What had you done there before?

A. Well, just nearly everything that was to be done on the bridge.

Q. Had you scaled down the forms from off the piers?

A. Well, that had been done ahead of us.

Q. What were you doing there at the time of the accident particularly?

A. Well, we were tearing out some of the forms from under the water, and tearing out the coffer-dam, taking out the supply-shaft and man-shaft.

Q. I will hand you Defendant's Exhibit 1, and I wish you would step down before the jury, Mr. Chalfan, and if you can step back here so the jury can see. Now, referring to the word "Float" there, what was that at the time?

A. Well, it was a float.

Q. Where was it anchored? What position did it have?

A. Well, it was anchored alongside of the pier, on the down stream side.

Q. Was it anchored to the coffer-dam?

A. Yes.

Q. How would you get onto this float?

A. Come down the steps.

Q. When you refer to the coffer-dam, what do you mean?

A. Well, this is the coffer-dam, that is outside.

Q. You mean the outside casing?

A. Yes, sir.

Q. Was it your purpose to tear this casing out,

too?

A. Yes, sir.

Q. How deep in the ground was that casing sunk?

A. I don't know. I had nothing to do with that.

Q. Was it below the water level?

A. At that time?

Q. The bed of the river, yes.

A. Well, sometimes it was below the water, and sometimes the water was below it.

Q. I mean, how deep into the ground was this coffer-dam?

A. I don't know.

Q. It was down into the water, anyway?

A. Yes.

Q. Now, these piers stood up about how high above the coffer-dam?

A. Well, I couldn't tell you. Possibly eighteen or twenty feet—something of that kind.

Q. Were there originally forms around them?

A. Yes, sir.

Q. How were those forms built, will you explain to the jury—the forms of these piers?

A. Well, they put on timbers on the outside, I should say 66 or something like that, and then nailed the boards to those.

Q. From the inside?

A. Yes. So as to have smooth surface from the outside.

Q. So as to have a smooth surface from the outside?

A. Yes.



Q. Then when you had the form built, what did you do?

A. Filled it up with concrete.

Q. You pour the cement in from the inside?

A. Yes.

Q. Are there any nails driven from the outside into the cement?

A. No, sir.

Q. The nails are all driven from the inside out, and the studding, or the timbers that hold the form are on the outside?

A. Yes.

Q. That is the crib work?

A. Yes, sir.

Q. Now, in tearing that down at the time of the accident, what had happened to the form around the piers?

A. Well, they had taken it down. They had jerked it down away down into here.

Q. Down to the water line ?

A. Yes.

Q. You had it down to the water line?

A. Yes, sir.

Q. What was done with the old form stuff and lumber?

A. It was throwed back up on the shore.

Q. How did you get it around there on the bank?

A. Well, we would lots of times just throw it in the water here, and they would pull it out on the bank, or we would throw it out there, and take it on up.

Q. Use pike poles?

A. Yes, we used a pike-pole.

Q. How did you scale it off the form of the pier?

A. Well, I never pulled any off, you see. What we got was here. We just pulled it out with the derrick from underneath.

Q. That is this coffer-dam?

A. Yes, and some of the forms, too, from underneath the water.

Q. From underneath. Where were these pipes you were going to take out?

A. One in here some place, and one there, and one about there.

Q. What had those pipes been used for?

A. Those two were supply-shafts. Put the concrete into the bottom, and rocks in the bottom. The other was a man-shaft.

Q. Where the men went down through the shaft?

A. Yes.

Q. And it was those you were going to take out?

A. Yes.

Q. At the time of this accident, Mr. Chalfan, were you engaged in tearing out this coffer-dam, and the forms, and the pipes, and cleaning there?

A. Yes, sir.

Mr. GILTNER: Now, if the court please, I object to leading this witness. He can ask him what he was doing, and then he may make a statement of what he was doing.

COURT: I think you better let him state.

Q. Do you know the length of the coffer-dam?

A. No, sir.

Q. Do you know the width of it?

A. No, sir.

Q. At the time of this accident, Mr. Chalfan, did you have a barge along the line marked "D", or hoisting derrick, or did you have anything along there?

Mr. GILTNER: I object to his leading this witness in that way. He can state what was there and how they were doing it. I think that is the proper way of conducting the trial, without leading the witness.

COURT: This witness knows whether or not they were down there. Let him answer that question.

Q. Do you know whether there was anything along the line "D" there?

A. We had our derricks along in here.

Q. What was that used for?

A. It was to pull off these forms, and this coffer-dam out of here, and take out the pipes and the shafts.

Q. What was this derrick composed of, and how would you fasten it. Just explain to the jury.

A. Well, there was a scow. There was a boom.

Q. A boom that projected out?

A. Yes, sir.

Q. And how did you get out to attach onto the forms?

A. Well, we would get out from the coffer-dam, attach from there.

Q. Did anything run from the boom-pole down here?

A. There was a line, a cable.

Q. And what was on the end of the cable?

A. I disremember. I couldn't say.

Q. Did you ever have any trouble along the line marked "D"? Do you know what the depth of the water was along the line marked "D"?

A. There wasn't much water here. At times it would be more; at times it would be less; and the water filled in. They throwed dirt over from here, and dirt in here, until it run over on the inside of the crib, and got dirt on the inside around this shaft. And we was trying to get that out.

Q. Do you know how deep this pier was sunk?

A. No, sir.

Q. What was done with the dirt that was taken out of those piers?

A. It was thrown in here and in here.

Q. That was when they excavated it was thrown in here?

A. Yes, sir.

Q. On the day of the accident, was Mr. Moore working for you?

A. Yes, sir.

Q. Just explain to the jury what you know about the accident and the facts.

A. All that I knew, I saw him, and he said he stepped on a nail.

Q. I mean prior to that time, how did he happen to get over here? Just explain the whole proceeding.

A. Well, I don't know how he got over. He was sitting over there quite a while, and I was over in that way, and I just asked him, I says, "What is the matter, Tom?" He says, "I ran a nail in my foot."

Q. Where was that conversation had?

A. This is the float.

Q. This is the float, the piers, and here is the bank.

A. Well, I was over in here.

Q. Where was he sitting?

A. He was sitting along in here some place.

Q. What on?

A. On the ground, I think?

Mr. GILTNER: Now, if the Court please, I don't want to be captious, but the witness never testified he was sitting anywhere. I don't think that is a proper way of trying a case. It is very leading and suggestive.

A. He might have been sitting on a board. He might have been sitting on the ground.

Q. Where was the board or the ground?

A. Right in here. Right along here somewheres —I am not sure.

Q. I wish you would make a mark with a pencil about the place.

A. Somewheres here. It is about in here some where, as well as I remember. I haven't been there since.

COURT: What is that mark?

Mr. SENN: "X" near the word "Plan," to the right of the word "Plan."

Q. How did you first happen to see him there?

A. Well, I happened to be in here.

Q. Were you near the float?

A. I was in here.

Q. How far is that from the float?

A. Well, I might possibly have been six or eight or ten feet from the float.

Q. Were you on the bank or on the stairs?

A. I was on the shore.

Q. Now, what transpired?

A. I just asked him what was the matter, and he said he stuck a nail in his foot. I asked him whereabouts. He said "Right here."

Q. What did he point to?

A. He just put his thumb over like that. I didn't pay any more attention. I says, "Did it hurt pretty bad?" He says "Yes," or something to that effect. I told him to go up to the office. I can remember telling him to go to the office and get something done for it. We always do.

Q. Well, now, when he pointed, what did he point to?

A. Well, he pointed to the board.

Q. Where was the board?

A. All over the shore.

Q. Was this board on the bank, or on the cofferdam, or in the staging?

A. It was on the bank, on the shore.

Q. What was he doing with his shoe?

A. He wasn't doing nothing with his shoe.

Q. Did he have the shoe off or was it on?

A. It was off at the time I saw him.

Q. Referring to the letter "A", and to Defendant's Exhibit 1, which purports to be a shore line marked in blue, I will ask you whether there was any scaf-



folding between this shore line and the bank—staging?

A. No, sir, we had no staging in there.

Q. How long had Mr. Moore been sitting on the shore there before you walked over to him?

A. I couldn't tell you that.

Q. Was it a minute or two minutes?

A. Oh, it might possibly have been two minutes; maybe more; maybe less.

Q. How many boards were lying on the shore there, do you know?

A. I couldn't tell you that.

Q. Were there five hundred or two hundred?

A. There was quite a number of them, lots of them torn off, lying around there.

Q. How long were those boards?

A. They varied in length from say possibly ten feet to maybe fourteen, something like that.

Q. After the accident, did you keep on working there?

A. I did, yes, sir.

Q. Had you ever ordered, or had you ever yourself built any staging or scaffolding to walk from the coffer-dam?

A. No, sir.

Q. Do you know which way Mr. Moore took to go across the river after the accident?

A. I couldn't tell you that.

Q. You went about your work and he went off?

A. Yes, sir.

Cross Examination.

Questions by Mr. GILTNER:

Q. Where were you when you told him to go to the office?

A. I was on the shore, on the East side.

Q. On the shore?

A. Yes, sir.

Q. You are positive of that?

A. Yes, sir.

Q. Do you remember testifying in this case on or about the 10th day of December, 1912?

A. I do.

Q. Do you remember testifying at that time that you went back onto the barge, and Tom Moore came over there, and you asked him how his foot was, and he said that his foot pained him, and you told him—he passed you on the barge, and you told him to go to the office? Do you remember testifying to that?

A. No, sir.

Q. Do you deny that you testified to that?

A. I do not.

Q. You do not?

A. I do not.

Q. You do deny that?

A. No, sir.

Q. I will ask you if you didn't, in the presence of Judge Bean and Mr. Senn and myself and the jury, whose names I do not recollect, make this statement: "Where was this barge? A. It was sitting on the outside piers. Q. Just on the other side of the coffer-dam from you? A. Yes, sir. Then I passed Mr.

Moore sitting on the shore, with his shoe off. I says, 'What is the matter with you, Tom?' He says he stuck a nail in it, so I went on over. Then I went across to the barge, and I think I unhitched, if I remember right. I done the unhitching while the other boys were getting ready to get the supply shaft out. He came out on the end of the barge where I was and said his foot pained pretty bad. I said for him to go on over to the office and have it attended to." Do you deny that you made that statement at that time?

A. I do not.

Q. What?

A. I didn't deny it, no, sir.

Q. Well, you did make that, didn't you?

A. Possibly I did.

Q. Then now when you state that you was on the bank when you told him to go to the office, you are mistaken, are you not, or were you on the barge? What is your answer to that?

A. Well, it has been some time ago. I disremember just exactly.

Q. Well, it wasn't a very long time ago.

Mr. SENN: Your Honor, I would like to have counsel read the rest of that testimony. The conversation he had with Mr. Moore on the bank.

Mr. GILTNER: I am not asking him about that.

Q. You testified today that you didn't see Mr. Moore go off the coffer-dam for the board, to take it over to the coffer-dam, did you?

A. I don't remember seeing him, or whether I

saw him or not.

Q. Didn't you so state today, that you didn't see him go off for the board?

A. I disremember whether I saw him or not.

Mr. SENN: The witness never testified to that at all.

Mr. GILTNER: Your Honor, we will go through his testimony. He stated he didn't see him come off the coffer-dam.

COURT: The jury will remember his testimony.

Q. Is it not a fact that at the other time when you testified in this case, at the same time and place, you stated that he came off the coffer-dam, and he came by you, or he came over on the float—he came around by you? I will get the testimony and read it to you, so that we will know. Here it is: "Didn't you just state to this jury you didn't know how he got to this pier—to this bank? A. Not when carrying the board, the second time. 'Q. That was the first time. Didn't you make the statement you didn't know how he got from this pier over there—you didn't know? Didn't you make that statement? A. Well, he passed me here, going here.'" (Meaning that you were on the bank at the time). "Q. Didn't you make that statement to this jury? You didn't know how he got from that pier over on the bank there? A. I might possibly. Q. Now you have changed your testimony and recall now that you do know, don't you? Mr. Senn: I don't think the witness testified to that at all. Mr. Spencer: I don't think he has changed his testimony. Q. That is a question for the jury.

Now, isn't it a fact that Mr. Moore was on this coffer-dam here?" Wait till I get the original question here. You answered that?

Mr. GILTNER: I don't want to take the time of the court, but I will get it and introduce it in rebuttal.

Q. Did you not state at that time and place, in the presence of the people whose names I have mentioned, that Mr. Moore came off the coffer-dam after you came off, and he went by the way of the float, and came around by you while you were on the bank of the river, and he stopped and asked you—or words to that effect—what to do, and you told him to go and get a board and take it over onto the coffer-dam?

A. I disremember just what I did say.

Q. Well, when is your recollection the best—now or when you testified the last time?

COURT: Answer the question, if you can.

A. Well, I disremember just how it was before, what I did say before.

Q. What is that?

A. I say I disremember just the words we did use before.

Q. You say you gave him orders to get a board?

A. Yes, sir.

Q. What was that for?

A. That was to get on the scow, where it was got out, floated out.

Q. What was that?

A. To get onto the scow.

Q. What was this board to be used for?

A. A gang-plank.



Q. A gang-plank for what?

A. Getting on the scow.

Q. Did you not testify at the other time, at the same time and place, during the trial of this case, that you ordered him to get that board for the purpose of putting over on the edges of this coffer-dam, so he would not get his feet wet while reaching down to the bolts in these pipes that went down into the coffer-dam?

A. No, sir.

Mr. SENN: Your Honor, we object to that question as not a proper question to ask this witness. If counsel has that testimony, let him introduce it, and let him read the statement to the witness. The witness never made any such statement in the other trial, and this is all imagination on the part of counsel. He has looked through his evidence here and couldn't find it. I think he ought to be required to read that.

Mr. GILTNER: That is not a fair statement at this time. I am repeating it as near as I can.

COURT: There seems to be a dispute about that. Mr. Senn says he didn't testify to that. I think you better get the record. You better refer to the testimony, and read that to the witness.

Mr. GILTNER: It will take a little time for me to get it. I will ask him a few more questions first.

COURT: Very well.

Q. What time did you go to work there that morning, Mr. Chalfan?

A. I disremember what time I went to work there at that point.



Q. What?

A. I disremember what time we went to work at that point that morning.

Q. Did you go over in the boat with Mr. Moore?

A. I didn't go over in no boat at all.

Q. Was Mr. Moore on the coffer-dam when you got there?

A. I disremember, sir.

Q. Did you see the men working on the coffer-dam when you got there?

A. No, sir.

Q. Didn't you see the men shoveling gravel from around these pipes at the coffer-dam?

A. When I got there?

Q. While you were working there?

A. When I first got there, there was nobody working there.

Q. Well, after you got there, didn't you see the men shoveling the gravel away from these pipes that were in the coffer-dam?

A. Yes, sir.

Q. And Mr. Moore was on the coffer-dam shoveling it away from them, was he not?

A. He couldn't reach it from the coffer-dam.

Q. What?

A. He couldn't reach it from the coffer-dam.

Q. I say, he was in there shoveling gravel with the other men, was he not?

COURT: Answer the question whether he was or not.

Q. If you remember.

A. That I disremember, whether he was there, or hitching on.

Q. You wouldn't deny but what he was, would you?

A. Well, I disremember whether he was or not—what he was doing exactly at that time when I got there.

Q. When did you first go to work there to strip these pieces off the coffer-dam, these side pieces here? This whole thing here is the coffer-dam, isn't it? (Referring to model).

A. Yes, sir.

Q. Now, these pieces on the sides were the pieces that you were taking off, were they, you claim?

A. Taking off some of them, yes, sir. That was not all we was taking off, though.

Q. You were trying to get those pipes out there, were you not?

A. Yes, sir.

Q. And you were shoveling—the men were shoveling gravel away from the sides of these pipes so they could get at the bolts, just as the engineer testified to, weren't they?

A. Some of them were, yes, sir.

Q. Now, what I want you to tell this jury is, what time you went to work on the morning of the 2nd of October.

A. I couldn't tell you, sir.

Q. Was it seven o'clock, or half past seven, or eight?

A. I disremember now what time I did go to

work. 7:30 was the time we most generally went to work. I never lost no time—was there nearly always on time.

Q. Do you remember of ever having stripped any of these pieces off this coffer-dam before the day of this accident?

A. I disremember whether we had taken any off before or not.

Q. Isn't it a fact, Mr. Chalfan, that the first day that you had anything to do with taking them off was the morning that Mr. Moore was injured?

A. I couldn't tell you now whether that was the first day or not. We might have been working there several different times.

Q. Isn't it a fact, Mr. Chalfan, that you hadn't taken any of these off there that day at the time—up to the time that Mr. Moore was hurt?

A. I disremember whether we had pulled any of that stuff off or not there around the coffer-dam.

Q. Did you not state during the trial of this case, in the presence of the parties whom I have already mentioned, that you had pulled some of these off prior to the time that Tom Moore was injured?

A. I say we might have pulled some of them off.

Q. What?

A. I say we might have pulled some of them off.

Q. I am asking you if you didn't state that you did before this, at that other trial.

Mr. SENN: Objected to. The testimony is the best evidence.

COURT: Do you remember what you stated at

the former trial?

A. I do not.

COURT: He says he doesn't remember.

Mr. GILTNER: That is all right. That is proper.

Q. Now, do you mean to tell this jury that you were pulling these boards off this coffer-dam while these men were in here shoveling this gravel away from these pipes on the morning that Tom Moore was injured, with a donkey-engine and chains?

A. Yes, sir, we pulled them any time.

Q. Wouldn't it be highly dangerous to do a thing of that kind?

A. No, sir, it would not.

Q. With these men working in this coffer-dam, with a big chain to pull these boards off the side?

A. It wouldn't be dangerous.

Q. It would not?

A. No, sir, it would not; not to my estimation, it wouldn't be dangerous.

Q. Had you made a pull that morning before Tom Moore was injured? Had you made any pull at all to pull these boards off before Moore was injured with the donkey-engine?

A. We make pulls right along with the donkey-engine, right along, it wouldn't stop.

Q. I ask you if you had made any pull that morning.

A. I guess we had. If we had been pulling—if we had worked there any length of time.

Q. You said you were on the shore over here, didn't you?

A. No, sir, I didn't say I was on the shore over there.

Q. Over here?

A. Yes. Over there from the shore. That is in the water there, I think, the way he has got it.

Q. Where were you—over here, then?

A. Up in there some place, yes, sir.

Q. How far—will you just indicate on here where you were with a letter "X"? This is supposed to be the bank going up, and this is supposed to be water here (On Plaintiff's Ex. A). Now, just indicate where you were standing.

A. This is supposed to be the bank here. Well, I was right along in here some place.

Q. Make a letter "X" there. (Witness does so).

Q. And I wish you would make a letter "C" over here where the scow was, with a donkey-engine, and where the engineer was.

A. I haven't got room.

Q. Well, make it approximately, about where it was.

A. It was off in here some place. The engineer would be away back in here.

Q. How far was he from the coffer-dam?

A. I couldn't tell you.

Q. How far was the barge from the coffer-dam?

A. I couldn't tell you.

Q. The barge that contained the donkey-engine?

A. I couldn't tell you that.

Q. What were you doing over here?

A. Giving him a signal.

COURT: How is that?

A. Giving signals to the engineer.

Q. Giving signals?

A. Yes, sir.

Q. What were you giving him a signal for?

A. To pull.

Q. Where did you have hold?

A. I couldn't tell you where I had then.

Q. Couldn't you more easily give him a signal from the coffer-dam than to get away over onto the bank here to give it to him?

A. No, sir.

Q. Why not?

A. Say we would be pulling in here, could I see from here?

Q. Yes, couldn't you?

A. No, sir.

Q. But you were pulling the boards off here? What board was you pulling off at that time?

A. I couldn't tell you, sir.

Q. Were you pulling one from the east side or the west side?

A. I couldn't tell you what I was pulling then. We had lots of stuff to pull there.

Q. But you were pulling boards off the coffer-dam, weren't you?

A. Possibly not off the coffer-dam at that time. Maybe from around the form.

Q. Well, this is the form, is it not?

A. It is not.

Q. What is that?



A. Coffor-dam.

Q. And that is the board that went around to make the coffer-dam, wasn't it? Now, where is the form you were pulling?

A. The forms we was pulling was under the water, around the pedestals.

Q. Down underneath the water?

A. Right at the edge of the water.

Q. Well, now, just show—just point here where you were making the pull, if you remember.

A. I couldn't tell you where we was pulling at that time.

Q. Were you pulling here at the north pier, the forms at the north pier?

A. I couldn't tell you.

Q. Well, if you were away over here, you must have been somewhere pulling some forms off the north pier or you wouldn't have been away over here, would you?

A. Not necessarily.

Q. Well, you wouldn't get away over here to give him a signal if you were pulling forms off the south pier, would you?

A. No, sir; and I wouldn't stand over there all day at that either.

Q. I didn't ask you that. By the way, did this donkey-engine make any noise while you were pulling there?

A. They most generally do.

Q. And at the time that you first saw Tom Moore, you were right where this cross was, and the donkey-

engine was making a pull on the forms?

A. At the time I first saw him?

Q. Yes.

A. No, sir, I was down in the shipyards the first time I saw him.

Q. But I mean the day of the accident. Don't get off that.

A. You asked me the first time I saw him.

Q. I mean the day of this accident. We are talking about this—not a month before.

A. That might not have been the first time I saw him.

COURT: Well, on the day of the accident.

Q. I am talking about the day of the accident.

A. Well, the first time I saw him on the day of the accident—I don't know where I was at that time. I might have seen him half-a-dozen times.

Q. Well, I mean when you were on the bank here, where this "X" was—were you making a pull then on the forms?

A. I couldn't tell you whether I was on the forms, coffer-dam, or what we was making a pull on.

Q. I didn't ask you whether you was on the forms. Now, is it not a fact that you could signal this donkey engineer better from over here on this part of the coffer-dam than if you got away over on the bank of the river here, away off out of sight from it, and out of the view, with this pedestal between you and him?

A. I didn't have that between he and I.

Q. What did you go onto this bank for?

A. To give a signal.

Q. Which way did you go to give that signal?  
Which way did you get off this coffer-dam?

A. Get off on the float, and go around that way.

Q. And you were on the coffer-dam before, wasn't you?

A. Yes, sir, I was on the coffer-dam several times.

Q. And if you were going to make a pull, the chain must have been fastened to the forms that you were going to pull, were they not?

A. Yes, sir.

Q. Now, wouldn't it have been much easier for you, instead of going away from this float, and down here, and around on these steps, and around on the bank of the river, to have simply stepped over here and given him a signal?

A. No, sir, it wouldn't.

Q. It wouldn't?

A. No, sir.

Q. Mr. Chalfan, is it not a fact that at the time you gave Mr. Moore the order to go and get the boards, some boards, that you were standing on the west side of the coffer-dam, near the north pier?

A. I disremember where I was standing.

Q. Just wait a minute till I finish this question—and Mr. Tom Moore was standing by your side there shoveling gravel, and you ordered him, told him to go across there and get a board to put across here, so that they could reach down and not get wet when they had disconnected this pipe, or words to that effect? Did you not do that?

A. I disremember where I was standing when I told him to get a board.

Q. Did you not state, in your direct examination, that you were standing over here where this "X" was?

Mr. SENN: We object to that, your Honor, as incompetent, irrelevant and immaterial, as not the testimony on direct examination. He said he was standing there at the time he saw Mr. Moore on the bank with his shoe off.

A. That is the time I saw him.

Q. Do you remember where you were standing when you ordered him to get this board?

A. No, sir.

Q. Did you not, in the presence of Judge Bean and Miss Bell, the stenographer, and the jury duly impaneled at that time, myself and Mr. Senn, testify that he came around from the float here, and he came there, and you ordered him—that he came from here to ask you what to do, and you told him to go and get boards off here, and take them and put them over like this on this coffer-dam? Did you not make that statement at that time, or words to that effect?

Mr. SENN: We object, your Honor. The witness didn't make any such statement.

COURT: You better find it in the record.

Mr. GILTNER: "Direct examination." I will read it. It is also on cross-examination—it is better than it is here. This is direct examination by counsel for the defendant in this case:

"Q. I wish you would state to the jury just what

you know about that and how it happened. A. Well—  
Q. And what work you were doing at the time. A. Well, we were pulling off the frames and getting ready to take out some of the—take out the main shaft and the supply shaft. Two sections was taken up and we was getting ready to take them out, and at the time I told Mr. Moore, he couldn't get across some way or other— Q. Across from where? A. From shore; I was standing on shore, and I told him to go over where the rest was and help them over there. He had been working over there; I disremember just what. Q. Where did you tell him to go? A. I told him to go over where the fellows were. COURT: Where were the boys? A. They were over on the coffer-dam. You see there was a gravel pile up where it had come out, in on the opposite side, and to the river side, where we could walk around there.” (now, that is on the west side of this coffer-dam). “It run in there quite a little bit. We were digging out around this supply shaft and the main shaft so they could get the plates out, about that much water, I should judge (indicating) and they would have to get their hands down in there; some had rubber boots; some didn't; plenty of rubber boots to put on. Mr. Moore was going over there and he couldn't get across, and I told him to get a board to get across. Pretty soon then I hollered to the engineer to give us a pull; we had come up and hitched on to the other side on the coffer-dam; we pulled on that. I got where I could see him and gave the signal. Q. Gave who a signal? A. The engineer on the barge.”



Q. Did you not make that statement at that time?

A. I disremember whether I said it just in them words or not.

Mr. GILTNER: I will get the other in the proper time.

Q. Mr. Chalfan, you say that Mr. Moore pointed to the nail that he stepped on?

A. He didn't point to no nail, no, sir.

Q. You asked him what he stepped on?

A. Yes, sir.

Q. Did you see the nail that he stepped on?

A. No, sir.

Q. Did you see the plank that he said he stepped on that contained the nail?

A. Well, I saw the planks laying there. He says, "I stepped on a nail in the plank."

Q. I say, did you see the plank that contained the nail that he stepped on?

A. I might have, I guess; there was plenty around there. I ought to have saw it.

Q. Did you see it?

A. I saw all the planks there was there.

Q. Do you mean to tell this jury there were no boards here on the east, just off the east end of this coffer-dam?

A. Off the east end?

Q. Yes, in the water here, off the east side of this coffer-dam.

A. We had loose boards in there.

Q. Loose, boards between the bank of the river and the coffer-dam. Do you mean to tell the jury



there wasn't anything there?

A. There might have been a loose board throwed across there, for them to walk on. I couldn't tell you about that. Sometimes there was.

Q. Did you look particularly to see whether there was?

A. No, sir, I didn't look particularly.

Q. For all you know there might have been some there?

A. They might have laid some across there, yes, sir.

Q. Is it not a fact that Tom Moore had gone across here and got a board, and came back and laid it on here, on this coffer-dam?

A. There wasn't none of these boards long enough for that.

Q. What?

A. There wasn't none of these boards of that kind long enough for that.

Q. I am not asking you that. Is it not a fact that Tom Moore had gone over and got a board, and laid it on the coffer-dam here, and the gravel that filled in on this edge, west edge of the coffer-dam and the gravel that was on the inside here, and then went over to get another, and when he went to get another he came back without it, and told you that he had stepped on a nail, or words to that effect?

A. He didn't come back and tell me he had stepped on a nail.

Q. Didn't he tell you that he had run a nail in his foot?

A. He told me he had run a nail in his foot up on the shore there when he was up there.

Q. You wasn't standing there when he told you?

A. No, sir.

Q. You are positive of that?

A. Yes, sir.

Q. Were you here on this coffer-dam at any time when Moore was there?

A. I might possibly have been.

Q. What?

A. I might possibly have been; more than likely I was, if he was around there any length of time.

Q. Now, you want the jury to understand it was over on the bank of the river that you gave him the orders to go to the office?

A. I don't know where I was right at the time. I remember telling him to go to the office.

Q. How far were you from Moore when you saw him sitting on the bank of the river with his shoe off?

A. Well, I couldn't tell you. I wasn't a great ways.

Q. How far?

A. When I first saw him, oh, I should judge maybe sixteen or eighteen feet—something like that. Maybe more, maybe less.

Q. You walked up to him?

A. I did. I passed right by him.

Q. And you asked him what was the matter?

A. Yes, sir.

Q. And he told you?

A. Yes, sir.

Q. Now, how did you get from the coffer-dam to the bank of the river?

A. I got around on the float.

Q. Who went first, you or he?

A. I couldn't tell you that.

Q. What?

A. I couldn't tell you that.

Q. What did he come over there for?

A. Come over there to ask me what to do.

Q. How did he get over there?

A. I couldn't tell you now.

Q. Did you not testify at the other examination that he passed you on the bank here?

A. He might have passed me there on the bank.

Q. But didn't you testify?

A. I disremember just how I did say.

Q. Well, do you remember now whether he did or not?

A. I tell you I disremember.

Q. What was the distance from the east board in the coffer-dam to where you were standing on the bank of the river?

A. How is that?

Q. What was the distance from where you were standing on the bank of the river to the east board in this coffer-dam?

A. I couldn't tell you that.

Q. Well, how many feet?

A. I couldn't tell you.

Q. Five feet?

A. Oh, it was more than that.

Q. Ten feet?

A. Oh, I should judge ten or fifteen feet.

Q. Ten or fifteen feet?

A. Yes, sir.

Q. Do you mean to tell this jury that Tom Moore came off this coffer-dam, around on this float, and around here, to ask you what to do, when he could have stood on the east, about ten feet from here, and asked you from the coffer-dam what to do—that he came away over there to ask you what to do, when he was about a distance from here to here from you?

A. Oh, no, I didn't say that.

Q. Ten feet, about?

A. You asked me about that coffer-dam—how far the coffer-dam was from me on the east side. You say now he was on the east side—that would make it about thirty feet more, wouldn't it?

Q. I mean over on the east side. If he had something to do, and he was working here when you left—he had something to do—he could have walked over on the east, and been about 10 feet from you, wouldn't he?

A. Yes; he could have waded it through there, too.

Q. He was about this distance from you? Do you mean to tell this jury Tom Moore got off on this float, and walked around here, when he could have been within ten feet of you, and asked you what to do, and you told him to go and get these boards from this point here? Answer that Yes or No.

A. How is that question?

Q. (Question read).

A. He would have walked around by the float to get to me anyway.

Q. What distance would that have been?

A. I couldn't tell you—possibly ten or fifteen feet.

Q. Well, I mean walking around on the float and around over here, what distance would that have been?

A. Well, it might have been five minutes killing time, you know—I couldn't tell you.

Q. Didn't you testify it was about thirty feet before, when you testified in this case?

Mr. SENN: We object, your Honor.

Mr. GILTNER: This is cross-examination, your Honor.

Q. What is it, Mr. Chalfan? Can't you tell this jury about what distance that was?

A. Well, I cannot tell you exactly. It has been quite awhile ago.

Q. What was the size of this pier? What was the length of it that way?

A. I couldn't tell you.

COURT: I don't think you need go into that.

Mr. GILTNER: I was trying to get an idea before the jury, to show them what distance he would have to go.

Q. You cannot tell that, can you?

A. I can't tell why he wouldn't halloo across, you say?

Q. Isn't it a fact he would have had to walk about forty or fifty feet to get around on the float, and go



over on the bank to ask you what he should do next?

A. Yes, sir, he would have.

Q. And he could have stood right on this corner here and asked you that?

A. Yes, but he wouldn't have.

Q. Wasn't Tom Moore an industrious and a good man, who worked for you there?

A. Sure he was. If he wasn't I would have canned him.

Q. What?

A. If he wasn't, I would have let him went.

Q. And he attended to his business, didn't he?

A. Yes, sir.

Q. You were working for the interests of the company, weren't you?

A. Yes, sir.

Q. Wouldn't you have canned a man when he could walk over here and be within ten feet of you and ask you what to do—canned him if he had walked fifty feet away around here to ask you?

A. I would have had to go to the office all the time for men if I had.

Mr. SENN: Objected to.

COURT: I think you have gone far enough for that.

Q. You would have had to be going to the office all the time for men, eh?

A. Yes.

Q. Do you know whether there were any boards from the coffer-dam—laid from the coffer-dam to the bank of the river?



A. I say there might have been boards laid across there.

Q. How many boards?

A. I couldn't tell you that.

Q. Do you know whether there was or not?

A. I say there might have been.

Q. I know, but I am asking of your knowledge; not what might have been.

A. There was no staging there. There might have been a loose board throwed in there. They might have throwed a loose board in there to get across, for all I know.

Q. I am not asking you what there might have been. I am asking you what you know.

COURT: He has already answered that. He said he didn't know; they might have thrown one across there.

Mr. GILTNER: I didn't hear that part of it—that he didn't know.

Q. This rope—this wire cable that comes down off this donkey—

A. What?

Q. This wire cable, whatever it is, that you used—attached to the drum of the donkey-engine there is a wire cable, isn't there?

A. Yes, sir.

Q. And that goes through a block up above, on a boom, doesn't it? That wire cable from the drum, up the side on a boom, and goes through a block up at the top, doesn't it?

A. Not through a block, no, sir.

Q. What does it go through—a sheave?

A. A sheave.

Q. Well, a sheave, then—I call it a block, you call it a sheave. It goes through a sheave, doesn't it?

A. Yes, sir.

Q. It drops down? That is called a fall, isn't it?

A. Yes, sir.

Q. Attached to that is what they call a sling, isn't there?

A. A chain.

Q. That is called a sling, isn't it?

A. No, sir.

Q. What is it?

A. It is a chain.

Q. Well, they call that a sling, don't they?

A. No, sir.

Q. All right; we will call it a chain. Then attached to the end of that chain are grab-hooks, aren't there?

A. One hook. Sometimes we put on a timber.

Q. Well, I know, but that is used for the purpose of getting hold of the timbers to pull away, isn't it—this grab-hook?

A. Not on a chain, no, sir.

Q. What do you do? Do you bore holes through these timbers to get hold of them, or what?

A. Take the chain off.

Q. Suppose in this case here, where did you have that chain? On what part of the coffer-dam, on the west side or the east side?

A. We wouldn't have no chain on the coffer-dam.

We couldn't get hold with the chain.

Q. You couldn't get hold of it?

A. No, sir, not with the chain.

Q. Well, then, what did you have hold of, and on which side did you have hold, to fasten this chain to before you gave the signal to them to pull?

A. I couldn't tell you.

COURT: He has already answered that he doesn't know where the hook was at the time.

A. I don't know where the hook had hold at the time being.

Q. Didn't you testify at the other trial that it was on the opposite side, as I have read the testimony here—it was on the opposite side from you where they were pulling, on the other side of the coffer-dam?

A. I disremember.

Q. Did you notice whether a man could setp off the coffer-dam here onto the dry land and walk over and get these planks?

A. At times he could, yes.

Q. Well, I mean the time that Tom Moore was hurt.

A. I disremember about that.

Q. Was there any dry land in there then?

A. I disremember whether the tide was up or down. It was owing to where the tide was.

Q. Well, if it had been dry land, instead of going off the coffer-dam away over there, you would have stepped off on the land and walked around here, wouldn't you?

A. Might not. Might have been over on that side.

Q. It would have been easier for you to do that, wouldn't it?

A. Not if I was on that side.

Q. The fact of the matter is there wasn't any dry land there at that time, was there, Mr. Chalfan?

A. There was land there, owing to the tide, you see.

Q. I mean at the time Tom went over to get the board?

A. I don't remember how the tide was at that time.

Q. You didn't notice particularly whether it was water or whether it was dry land, did you?

A. No.

Q. Now, who was standing with you when you walked up—was any one standing with you when you walked up to Mr. Moore when he was sitting on the bank of the river?

A. I don't think so.

Q. What?

A. I don't think so. I disremember whether there was anybody or not.

Q. You went up alone, didn't you?

A. Sir?

Q. You went up to him alone, didn't you?

A. Passed by. I think I was the first one up to him. I am not sure about that; might have been some of the other boys there—I disremember. I seen him there.

Q. You heard Mr. Hoffstatter testify, did you not, in this case before?

A. Yes, sir.

Q. You heard Mr. Hoffstatter testify that you and he were on the coffer-dam, did you not, when you saw Tom Moore sitting on the bank of the river?

A. I don't know what his testimony was.

Q. Well, didn't you hear him testify to that?

A. I disremember what he testified to.

Q. Isn't it a fact that he did testify to it?

COURT: He has answered that question. He said he didn't remember; that he disremembered what he did testify; and that ought to be the end of it.

Q. Then you have no recollection of Hoffstatter testifying to that?

A. No, sir, I have not.

Q. What?

A. No, sir, I have not.

Q. You were here during all the trial, and after Hoffstatter testified in the last case, were you not—at the last time we tried this case?

COURT: If you are going to impeach Hoffstatter, you better wait until he is called.

Mr. GILTNER: I want to show that he didn't deny it; that Hoffstatter testified in his presence, and that he was in here during the time.

COURT: I don't think that would be evidence in this case now.

Q. Is it not a fact that when you first saw Tom Moore sitting on the bank of the river, you said to Mr. Hoffstatter, while you and Mr. Hoffstatter were standing on the coffer-dam, "What is the matter with Tom Moore?"

A. I didn't say that as I remember of.

Q. Just a minute. And that then you and Mr. Hoffstatter walked off on the float and around over to where Moore was, and asked him what was the matter with him, or words to that effect?

Mr. SENN: We object to that, your Honor. There is no such testimony in the case.

COURT: If he is laying the foundation for impeachment now, that is a different question.

Q. Isn't that the fact? Said in the last trial in the presence of the parties I speak of?

A. The first time I saw Mr. Moore was where I told you.

Q. Answer that question Yes or No, and then you can explain.

A. That is the first time I saw him was where I told you.

Mr. GILTNER: Is that a sufficient answer to that? He doesn't answer Yes or No.

COURT: You can answer the question whether it was or not.

Q. (Question read).

A. I don't remember telling Mr. Hoffstatter anything about it.

Q. What was the distance that Mr. Moore was from the east board of the coffer-dam, where he was sitting on the bank of the river?

A. I couldn't tell you.

Q. Was it five feet or ten feet, or fifteen feet or twenty feet?



A. He was possibly a little further up on the shore than I was.

Q. Well, say about ten feet—twelve feet?

A. I told you how far I was about.

Q. Well, about twelve feet, then. Now, if you were on this coffer-dam, you could very easily have stood on the coffer-dam and asked him, being about ten feet away from here, to this man here, on the end here, and asked him what the matter was without going off of the coffer-dam over to him, couldn't you?

A. Sure I could have, yes, sir.

Q. And if you had been on the coffer-dam, you would have done that, wouldn't you?

A. I don't know. If I was on the sidewalk, and you got your leg cut off on the street, I think I would run out and see how you was.

Q. Well, that might be so, too.

A. Yes, something like that.

Q. What time in the day was it that this accident happened?

A. I disremember what time it was.

Q. Was it in the forenoon or the afternoon?

A. I think it was in the forenoon.

Q. How long had you been working there?

A. About five months.

Q. Oh, I mean on the day on which this accident happened.

Mr. SENN: We object to that, your Honor. He has gone over this half-a-dozen times.

Q. I mean on the day this accident happened, how long had you been working there that day?

A. I answered that once. I told you that once or twice, I think.

Q. You had been working an hour?

COURT: You may state about how long you had been working there that morning before the accident.

A. It might have been an hour; might have been longer.

Q. You don't know, do you?

A. No, sir.

Q. Where is this engineer that was pulling these—working there running the engine, the donkey-engine on the scow, where is he?

A. I couldn't tell you that.

Q. What was his name?

A. I only knew his first name—Earl.

Q. Well, what was his first name?

A. Earl, I told you.

Q. Earl who?

A. I told you I didn't know only his first name.

Q. Was he there that morning?

A. Yes, sir.

Q. Isn't it a fact, Mr. Chalfan, that there wasn't any scow there that morning? There wasn't any engineer there that morning, but it was the next day that you had the engineer and the scow there? Isn't that the fact?

A. No, sir, we had a scow there.

Q. That morning?

A. Yes, sir. If we hadn't, we wouldn't have been over there; couldn't have done nothing.

Q. What?

A. Couldn't have done nothing without a derrick scow. It was what we were there for.

Q. Couldn't have got these pipes out without it—couldn't shovel the gravel away from the pipes without the scow there?

A. Well, that is about the same thing as asking if the locomotive fell off the bridge the engineer and fireman wouldn't swim out to the locomotive—these men wouldn't swim out to that pipe.

Q. How did the bank run up from the edge of the water? Just indicate by your hand that way how it ran up, about how steep it was from the edge of the water.

A. Well, in one place it was pretty steep; on this end upstream. Then it wasn't so steep after you got down further.

Q. Towards the center here, over here? How was it there where these boards were piled?

A. It wasn't so very steep in there, and back towards the float.

Q. How far from the edge of the water were these boards piled there?

A. They were piled all over.

Q. I mean that were piled up in a pile—how far were they from the edge of the water? How far back from the edge of the water?

A. I couldn't tell you that. They were scattered all around.

Q. Did you not testify at the last examination

about two or three feet?

A. They might have been two or three feet. I say they were scattered all around.

Q. Well, I say, didn't you testify the last time, at the same time and place, it was about two or three feet? Do you remember whether you did or not?

A. I disremember.

Q. Well, that is all right. Just answer it. We will have no fight. Have you got anything at all to show, being a foreman, any memorandum book, any writing to show whether or not you were working on this coffer-dam on the first day of October, 1911?

A. I don't keep no records of that at all.

Q. You didn't keep any record?

A. No, sir.

Q. What day of the week, if you remember, was the 2nd day of October?

A. I disremember.

Q. What was the width of that float?

A. Which float is that?

Q. The float at the north of the pier—the north pier.

A. I couldn't tell you.

Q. How was the float anchored?

A. The way I remember it, it was anchored with a rope there.

Q. What to?

A. Well, to the coffer-dam, or something right in at the coffer-dam. I couldn't tell you just what it was anchored to.

Q. You say you have been working for the Inter-

national Bridge Company?

A. Yes, sir.

Q. When did you quit their employment?

A. On the 2nd.

Q. 2nd of what?

A. April.

Q. Who was the superintendent of you there?

A. Well, I disremember. I don't know his name.

COURT: Is that another bridge company?

A. Yes, sir.

Mr. SENN: Yes, your Honor. We object as irrelevant.

COURT: What has that to do with this case?

Mr. GILTNER: It might become material.

Q. Did Mr. Dawson work over there?

A. Sir?

Q. Did Mr. Dawson work for this International Bridge Company?

A. He did, yes, sir.

Q. Was he superintendent over you over there?

A. At that time?

Q. Yes.

A. No, sir.

Q. You worked there at the same time?

A. Sir?

Q. Did you and he work there at the same time?

A. We did, yes, before this.

Q. Do you remember when he quit working there, or is he still working?

Objected to as irrelevant.

COURT: That is immaterial. That is not cross-

examination.

Q. Have you talked about what you were about to testify to in this case, since you came over here, with anybody?

Objected to.

A. Sir?

Q. Have you talked with any one as to what you were going to testify to in this case since you came over here?

A. Since I came over here?

Q. Yes.

A. Yes, sir.

Q. Whom did you talk with?

A. Talked it over with Mr. Senn and Mr. Alexander.

Q. You went over all these details again, did you, of your testimony—went over all the testimony?

A. Well, I don't think we did, sir.

Q. Did you talk with Mr. Dawson about it?

A. I don't think I spoke to Mr. Dawson direct about it.

Q. What is that?

A. I don't think I spoke to Mr. Dawson direct about it at all.

Q. Did you talk in his presence about it?

A. Yes, sir.

Objected to.

Q. What was your answer?

COURT: He said Yes, sir.

Q. And was a man by the name of Hoffstatter there when you were talking it over?



A. Yes, sir.

Q. And you were going over the details again in this case, were you, of what happened there?

Mr. SENN: Your Honor, we object to that as not proper cross-examination, not material.

COURT: Do you want to impeach this witness now?

Mr. GILTNER: Trying to. I will do the best I can, yes.

Mr. SENN: Just a fishing expedition, your Honor.

COURT: Then you better ask him the question, and ask him what was said.

Q. Did you not state in your last examination, in answer to this question, as follows: "Do you know where he (Tom) was going to take that plank to? A. He was going in here. The tide had come in, was higher here. Q. He was going to put the planks in where they were working? A. Yes, sir." Did you not testify to that at that time, or words to that effect?

A. I don't think so, exactly like that. It may have been just like that.

Q. What?

A. I don't hardly think it was just like that. It may have been.

Q. Then the stenographer put it down wrong, did she?

COURT: He says he didn't think; it might have been.

Q. Do you deny you testified that way?

A. No, I don't deny it. It might have been just

that way.

Mr. GILTNER: Your Honor, to save calling the stenographer, I would like the Court to read this. She made this transcript for me.

COURT: You can read it. I suppose there is no denial that that is his testimony, Mr. Senn? You don't make any question but what that is his testimony?

Mr. SENN: No. He can read that to the jury, and introduce it afterwards.

Mr. GILTNER: I will read what he testified to before.

COURT: How much of that are you going to read?

Mr. GILTNER: I will read just about six lines.

COURT: Very well. Read it.

Mr. GILTNER: Testimony of Mr. Chalfan at the other trial of this case. The following questions were asked him: "Q. And he was over here, wasn't he? A. Yes, sir. Q. Do you know where he was going to take that plank to? A. He was going in here. The tide had come in, was higher here. Q. He was going to put the planks in where they were working? A. Yes, sir."

Q. Did you make a written report to this company of how this accident happened?

A. I disremember whether I did or not. Most generally had to sign—just sign for them is all.

Q. Did you not state at the other trial, in answer to the following question: "Did you make a report of this to the company?" "Well, I made out—I filled

out a slip just how it was”?

A. I most generally always had to fill out a slip like that.

Q. What?

A. We always had to fill out a slip like that when one of our men got hurt.

Q. Did you fill it out?

A. I guess I did. I signed it, and the other man filled it out.

Q. Did you have a copy of it?

A. No, sir.

Q. Whom did you give it to?

A. I didn't give it to nobody. All I done was sign it up there.

Q. Who got it from you—Mr. Alexander?

A. The timekeeper, was the man that was there.

Q. “Q. Did you make a written report? A. They wrote it out, and I read it and signed it. It was right.” Did you state that, or words to that effect?

A. That is the way it is. That is the way we have to do it.

Q. Do you know whether Tom Moore was working at that pier before that morning that he was hurt?

A. I don't know where he had been working before then.

Q. Don't you know that that was the first time he worked at that pier with you?

A. Sir?

Q. Don't you know that is the first time that Tom Moore worked at that pier with you?

A. I don't know whether he worked there before or not. He might have been with me. It was off and on, first one and then another. I couldn't say.

Q. Did you pull off any of these planks off the coffer-dam after the 2nd day of October?

A. I disremember whether we did or not.

Q. Did you pull off any before the 2nd day of October?

A. I disremember that.

Q. But you do know you pulled them on the 2nd day of October, don't you?

A. Might have been the 2nd; might have been the 10th. It was the day he was hurt. I disremember the date.

Q. Which way was this barge? Which way was the bow of this barge facing—north or south?

A. The bow?

Q. Yes.

A. The front of the barge, the end we was using the boom on, was facing this way.

Q. Facing north, down this way?

A. Well, it swung out in the river.

Q. This is the north pier, you see. This is the south.. Now, which way was the barge facing, north or south?

A. Well, it was facing up this way.

Q. That would be north—towards the north pier?

A. Yes, facing towards the north pier.

Q. Now, the donkey engineer would be facing the north, then, would he?

A. Yes, sir.

Q. How high up above the rail, this west rail of the coffer-dam, was the scow on which the donkey-engine was that day?

A. I couldn't tell you.

Q. How high—how near the top of this west rail of the coffer-dam was the water on the day on which this accident happened, on the morning on which the accident happened?

A. I couldn't tell you that. It was owing to the way the tide was.

Q. How high above the coffer-dam was the engineer when you gave him the signal, just before or after you saw Tom Moore sitting on the bank? Was he above this west board on the coffer-dam?

A. Yes, sir.

Q. How high was he?

A. I don't know how deep the scow was.

Q. Did the top of the scow extend up above this west board of the coffer-dam?

A. Yes, sir.

Q. Well, then, he must have been up above it, wasn't he?

A. He could have been, yes, sir, if he was on top of the scow.

Q. You don't know how high.

Excused.

FRANK M. HOFFSTATTER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SENN:

Mr. Hoffstatter, where do you live?

A. Seattle, Washington.

Q. And where have you lived in the past?

A. Seattle.

Q. Did you ever work for the Union Bridge & Construction Company?

A. Yes, sir.

Q. Are you working for that company now?

A. No, sir.

Q. Were you working for the company at the time Mr. Moore was hurt?

A. I was.

Q. Where were you working?

A. Over on the East side there, at the pier?

Q. That was known as Pier 7?

A. I think so.

Q. Who else was working there, do you know?

A. Well, I don't know them all. There were several fellows there. There was so many worked there off and on, that possibly it would be impossible for a man to be acquainted with all of them.

Q. Mr. Chalfan working there?

A. Yes, sir.

Q. Do you know anything about the float that was at the north end of the north pier that the men walked out upon?

A. Yes.

Q. I wish you would just step up here, Mr. Hoff-



statter, in front of the jury.

Mr. GILTNER: I wish he would speak a little louder so I can hear him.

Q. Referring to the word "Float," state whether or not it was abutting up against the pier?

A. Yes, sir.

COURT: Mr. Hoffstatter, speak out, so the jury can hear you and the counsel.

Q. Now, referring to "B" and "C"—that is these two piers here—did they set inside of the coffer-dam?

A. They did.

Q. This coffer-dam marked on one side with a "D", if I understand it correctly, ran clear around the piers?

A. Yes, sir.

Q. This form that held the concrete for the piers, did that set inside of the coffer-dam?

A. Yes, sir.

Q. About how far was the pier from the coffer-dam?

A. Well, I don't know. I think something like two feet. I am not positive.

Q. That is, from the red lines of "B" and "C" to the blue lines of the coffer-dam would be two or three feet?

A. Something like that. I am not positive. I never measured it.

Q. Now, on the morning of the accident what is the fact as to whether or not lumber had been torn off from these piers?

A. It had.

Q. How far down had it been torn off?

A. Right off this same pier.

Q. Yes.

A. It had been torn down practically to the water's edge.

Q. What was done with that lumber?

A. It was just thrown out, some piled up on the bank.

Q. How did you tear that off?

A. Pulled some right off with the engine and picked some of it off; wires screwed on, you know, wired on there; and some pulled off with bars.

Q. Any way to get it off?

A. Any way to get it off?

Q. Now, at the time of this accident, what were you doing around here?

A. Well, we was pulling off this 12x12—this coffer-dam stuff; also some of this stuff we could get. Most all of this stuff we had been pulling on it.

Q. You had to clear up the coffer-dam stuff and the stuff that was beneath the water's edge on these piers?

A. Yes, sir.

Q. And this coffer-dam, about how high above the water did it extend?

A. When it was first built?

Q. Well, about the time of the accident?

A. When the tide was in there was more—when the tide was out there was more in sight than when the tide was high. It would be right up to the taper of the coffer-dam sometimes.

Q. Do you know how high the tide is there?

A. No, sir.

Q. You don't know how many feet it is. Now, state whether or not from this coffer-dam to the bank at times there was land, or what was the fact?

Mr. GILTNER: I wish to object to that unless he confines himself to the day on which this accident happened.

COURT: We are asking about that. I presume he will confine himself to that.

Q. About the time that Mr. Moore was hurt?

Mr. GILTNER: I mean the day of the accident.

COURT: I overrule the objection.

A. I don't know, but this is the water line on here. There was stuff, you know, that come out of these things here, on each of these, that was dumped on both sides of this pier. Sometimes you could walk from the coffer-dam to the shore; other times you couldn't.

Q. It would depend on the tide?

A. Yes, sir.

Mr. GILTNER: I move to strike that out as not responsive to the question.

COURT: The motion is overruled.

Exception allowed.

Q. Do you know how deep these piers were sunk?

A. Something like 33 feet—35 feet—something like that.

Q. Do you know the diameter of them?

A. No, I do not.

Q. All the dirt that came out of there, what was

done with it?

A. Well, they had what they call blow-pipes, and some of them were blown out further than others; but most of it was dumped around this coffer-dam.

Q. Over here and out here?

A. Yes, sir.

Q. Did you see Mr. Moore at the time he was hurt?

A. No, sir.

Q. How long after the accident, or when did you first see him?

A. The first I seen him he was sitting down on the bank.

Q. What was he sitting on?

A. Well, I don't remember now. I think he was sitting on a pile of lumber there.

Q. What was he doing?

A. He had his shoe off when I first saw him. He was sitting there.

Q. What did you do?

A. I went to where he was in a little while.

Q. Was there any one there at the time you got there?

A. Yes.

Q. Who was there?

A. Chalfan.

Q. Was there any conversation had with him at that time?

A. Not with me.

Q. Did Mr. Chalfan have any talk with him?

A. Yes.

Q. What was the conversation?

A. He asked him what was the matter, and he said he stepped on a nail.

Q. Was there any further conversation?

A. Not that I heard.

Q. Did he state anything about where the nail was?

A. He said it was in the board.

Q. Did he point to the board, or did he not?

A. No, not when I was there. He pointed off that way. Now, I don't know whether he meant to the board, or what it was.

Q. Where were those boards that he pointed to?

A. They was all around on the shore there.

Q. On the bank where he was sitting?

A. There were boards scattered all over there.

Q. How many boards were there there?

A. Oh, I don't know. There must have been two or three thousand boards—a pile of them.

Q. They came clear from the top of the pier?

A. Yes, sir.

Q. How long were those boards?

A. Well, there would be some of them would be probably—I think two-foot was the shortest piece they could use.

Q. Two feet long, some of them?

A. Yes, sir. That would be the shortest piece. Very seldom they used a piece two feet long; at times they did. And there were some fourteen or fifteen feet, I suppose. I don't know just how long.

Q. That was about the longest?

A. Yes, sir.

COURT: How long did you say?

A. Between two feet and fifteen feet, as near as I remember. I never measured them.

Q. Do you know the width of this coffer-dam?

A. I will tell you, I have heard them speak of it. I think they say it was 20 feet to 24 feet—something like that. I am not positive about that, though.

Q. From one side to the other?

A. Yes, sir.

Mr. GILTNER: Don't state what anybody told you, Mr. Hoffstatter. I think the Court will tell you that. Only state what you know.

Q. Mr. Hoffstatter, just hold that a minute (Exhibit 1). Pointing to the letter "G" between the coffer-dam line and the line marked with a letter "A" to represent the shore line, was there any scaffolding or staging in there?

A. Not that I have seen.

Q. If there had been one there, would you have seen it?

Objected to as calling for a conclusion of the witness.

Objection overruled. Exception allowed.

A. They could have had staging there, but you know I worked there all the time, and I never seen one there, if there was any there.

Q. Was there any staging there the day of the accident?

A. Well, now, I don't know whether there was or not. There might have been plank throwed in there,



because there is quite often plank throwed in there to walk on.

Q. Was there any built staging in there?

A. There was no built staging.

Cross Examination.

Questions by Mr. GILTNER:

Mr. Hoffstatter, where were you when you first saw Tom Moore sitting on the bank?

A. I was on the coffer-dam.

Q. On the coffer-dam?

A. Yes, sir.

Q. And who was on the coffer-dam with you?

A. Mr. Chalfan.

Q. And what did he say to you at that time?

A. Who?

Q. Mr. Chalfan.

A. He said Moore was hurt and he was going up to see what was the matter with him.

Q. And then what did you do?

A. Well, he went up there, and after he went up a little while, why, then I went up.

Q. But you walked around on the float and went over there?

A. Who?

Q. You and Chalfan?

A. Well, now, Chalfan went first. I don't know how he went. But I went along on the coffer-dam to the float, and then went up there, yes, sir.

Q. And did you see the nail that this man stepped on?

A. No, sir.

Q. How long had you been working there that morning, Mr. Hoffstatter?

A. Well, I don't know now. I think somewhere in the neighborhood of an hour and a half, maybe two hours; maybe a little longer, and maybe not quite so long.

Q. Did you see the board that he stepped on, that contained the nail that he stepped on?

A. Well, now, there is lots of boards scattered—

Q. Well, I know, but did you?

A. No, I did not see that one particular board, he pointed right at.

Q. You didn't see the board that contained the nail that he stepped on?

A. No.

Q. These piers that had the forms around them had been stripped down to the water's edge before you came there that morning, had they not?

A. Yes, that time they had. I had worked there before and helped strip them off.

Q. They had been taken off there prior to that time, hadn't they?

A. Yes, sir.

Q. Do you know whether Moore had brought any board over onto the coffer-dam before you saw him sitting on the bank of the river?

A. No, sir, I do not.

Q. You don't know whether he had or not?

A. I couldn't say, no, sir.

Q. Did you have anything to do with shoveling

the gravel away from the pipes?

A. No, sir.

Q. You had nothing to do with that. What company are you working for now?

A. The International Contract Company.

Q. That is a bridge company, is it?

A. Yes, sir.

Q. Is Mr. Dawson working for them?

A. Well, as to that I couldn't answer; I don't know. He has not been for the last two weeks, that I know of.

Q. He was sick the last two weeks, wasn't he?

A. Yes, sir.

Q. Up to the time he got sick, he was working for them?

A. Yes, sir.

Q. Was he superintendent over you over there?

A. I beg pardon? Which place?

Q. Over at Seattle.

A. Yes, sir.

Mr. SENN: Your Honor, we object to that as incompetent, irrelevant and immaterial.

COURT: I don't see what that has to do with this case.

Q. Now, do you know, Mr. Hoffstatter, when you first went to work on that pier with Mr. Chalfan?

A. No, I do not.

Q. Do you know whether you went to work there on the first of October?

A. No, sir.

Q. On the 30th of September?

A. No, sir.

Q. How long did you work after this accident happened to Mr. Moore?

A. How long did I work with Mr. Moore?

Q. No, how long after the accident happened did you work on that pier?

A. Well, I didn't work there at all.

Q. I mean on the coffer-dam?

A. I didn't work—I don't remember—I quit there in October.

Q. Did you quit on the third day? The accident happened on the 2nd day of October, 1911. Now, did you work the next day after that on that pier?

A. I don't know whether I worked on that pier or not, but I worked for the company there.

Q. You don't know whether you worked the next day after Tom was hurt or not, do you?

A. Yes, I worked the next day.

Q. I mean on that coffer-dam?

A. No, I don't remember now whether we did or not.

Q. What was the draft, if you know, of this scow that contained this donkey-engine, that was immediately on the west side of the coffer-dam over here? How much water did it draw? Or did you see a barge on the west side there?

A. Yes, there was a barge there, but I don't know how much it would draw. I should suppose it would draw all the way from four to six feet of water. I am not sure of that. Maybe not so much.

Q. It might have been ten or fifteen, for all you

know? Isn't that a fact?

A. Hardly that much, no.

Q. Well, did you ever measure the water there?

A. Measure the water?

Q. Yes.

A. No. But I know it would be impossible, because a barge is hardly ever over five feet. Sometimes six.

Q. What is that—a barge never draws more than five?

A. Those barges, I say, would hardly ever any of them be built over six or eight feet, so they couldn't draw fifteen feet of water, when they are only that high.

Q. What was the depth of this barge?

A. I don't know.

Q. What was the weight of the donkey-engine that you claim was on that barge?

A. I don't know.

Q. Did you see any one shoveling gravel there that morning?

A. Well, I believe there was some shoveling going on there, yes.

Excused.

J. M. DAWSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SENN:

Where do you live now, Mr. Dawson?

A. Seattle.

Q. And what is your work?

A. Bridge work.

Q. And with what company are you?

A. International Contract Company.

Q. How long since you have worked for the Union Bridge & Construction Company?

A. Union Bridge & Construction Company?

Q. Yes.

A. I have put in about five years with them.

Q. How long since you stopped working for them?

A. Since I stopped working for them?

Q. Yes.

A. It is a year ago the first of this year. It has been about fifteen months.

Q. Were you working for the Union Bridge & Construction Company on the 2nd day of October, 1911?

A. Yes, sir.

Q. In what capacity?

A. Assistant Superintendent.

Q. Who was the superintendent there?

A. M. F. ———

Q. You were his assistant?

A. Yes, sir.

Q. What work were you doing on that bridge?

A. Well, I looked after sinking of piers, concrete work, building of the coffer-dams, building of the forms, general work all over.

Q. That was the contract of the Union Bridge



Company to sink those piers?

A. Yes, sir.

Q. Do you know how deep Pier No. 7 was sunk?

A. I think 35 feet.

Q. Below the top of the ground?

A. Yes, sir.

Q. And how high in the air did it project?

A. In the neighborhood of twenty feet.

COURT: That is detail that has been established heretofore. What is the use of going into that?

Mr. SENN: Yes, I think that is so, your Honor.

Q. Did you have in your employ a man by the name of Piltz?

A. Yes, sir.

Q. What kind of work did he do?

A. Well, he worked in the gangs at times. Sometimes I would give him a few laborers to load cement—look after three or four men, something like that.

Q. What wages was he receiving?

A. \$3.00 a day.

Q. What wages did Mr. Moore receive?

A. \$3.00, I believe, was his wages.

Q. Did you ever send Mr. Piltz over to pier No. 7, and instruct him to build any scaffolding or staging?

A. Not to my memory.

Q. What is that?

A. No, sir. Not in my memory. I don't remember doing it.

Q. How do you know that?

A. Well, I had scale men there, such as carpenters, bridge men, that done such work as that. I

didn't trust him to do that class of work.

Q. Was Piltz one of those carpenters?

A. No, sir.

Q. Did he, while he worked for you, have anything to do with building any stagings or scaffolding?

A. Not to my memory, no, sir.

Q. What was his work?

A. Well, common labor.

Q. What position did Mr. Holmes, who testified here this morning, the engineer,—did he work for the Union Bridge Company, or did he have anything to do with the Union Bridge Company?

Mr. GILTNER: That has been gone into, your Honor. He testified he was working for the city.

COURT: What was your question, Mr. Senn?

Mr. SENN: I asked him whether Mr. Holmes was in the employ of the Union Bridge & Construction Company, or in whose employ he was at the time of this accident.

COURT: He can answer that question, if he knows.

A. He was in the employ of the Modjeski Engineering Company, I understood.

Q. And in whose employ were they?

A. They were in the employ of the city, looking after the construction of the Broadway Bridge.

Q. They were the City Engineers on the job?

A. They were City Engineers.

Cross Examination.

Questions by Mr. GILTNER:

How long have you known Mr. Piltz?

A. How long have I known him?

Q. Yes.

A. I have known him but a short time. I don't remember just how long he worked there. He came on the job, and wanted a job.

Q. Came when they first started the job there?

A. How is that?

Q. He came on to work there when they first started the job?

A. No, I think the job had been running quite a while before he came there. I couldn't give the date that he went to work.

Q. You remember him, don't you?

A. Oh, yes, I remember him.

Q. How long do you say you have been working for that company?

A. The Union Bridge Company?

Q. Yes.

A. I put in about five years with them.

Q. And you claim that you only knew him a short time before they commenced to work on the bridge there, or after they commenced to work on the bridge?

A. After he began to work there.

Q. You don't know whether he was working for the company or not before that?

A. No, sir.

Q. Now, I didn't catch your testimony—did you testify that you never sent him over to the East pier at any time with any men?

A. I did.

Q. Did you testify to that?

A. I testified that I did not send him over there.

Q. You gave a great many orders during the time you were there, did you not?

A. Yes, sir, I gave orders.

Q. And you gave him orders, too, didn't you?

A. Yes, sir.

Q. You gave him a great many orders?

A. I received my orders from the Superintendent, and I carried the work out during the day.

Q. You gave him a great many orders, too, didn't you?

A. Oh, yes, yes, sir.

Q. And do you know when he quit working there?

A. I couldn't give the date of the time the man quit, but I remember when he quit.

Q. What?

A. I remember about him quitting there.

Q. What kind of a man was he?

A. Piltz, you have reference to?

Q. Yes.

A. Well, he was just an ordinary man.

Q. He was a good man, wasn't he?

A. Well, he was no extraordinary man.

Q. I know, but reliable man; that is, truthful man?

A. Truthful?

Q. Yes.

A. Well, to a certain extent, I guess he was. I couldn't say nothing again' the man.

Q. About as truthful as men go, wasn't he? That is what you mean, isn't it?

A. Well, he was average. I couldn't say nothing again' the man. I don't know anything against the man.

Q. That is what I mean, Mr. Dawson.

A. Yes, sir.

Q. You are positive, now—it is not possible that you were mistaken when you said that you never gave him any orders to do anything over there on the East pier? You are positive of that, aren't you?

A. No—beg pardon. That I did not send him there to build a scaffold.

Q. No, but you sent him over there to assist? You sent him with some men over there to assist in stripping the piers, didn't you?

A. That might be.

Q. And he had charge of those men, didn't he?

A. He had charge of the laborers, yes.

COURT: Who had charge of the men?

Mr. GILTNER: Mr. Piltz.

Q. Do you remember when that was?

A. When they were stripping that pier?

Q. No, when you sent him over there?

A. No, sir, I do not.

Q. You didn't go over there after they had stripped the piers, did you?

A. Oh, I have been around the pier a number of times after it was stripped.

Q. Well, I mean before this?

A. And before it was stripped.

Q. After you sent Piltz over there, do you remember of ever going over?

A. After Piltz had been there?

Q. Yes.

A. Yes, I used to pass it every morning, and every evening going home.

Q. I mean, were you on the coffer-dam?

A. Being on the coffer-dam—you mean that I was on the coffer-dam?

Q. Yes.

A. I don't know that I was on the coffer-dam myself.

Q. You individually did not do any work yourself there?

A. No, sir, not any more than I could help.

Q. Now, there was a ladder, Mr. Dawson, hanging on the top of the north pier?

A. Yes, sir.

Q. How was that fastened on the top?

A. To my remembrance, I think it was fastened with a line and some bolts in the top of the pier, if I remember right.

Q. And hung down, didn't it?

A. Yes, I think, if I ain't mistaken, I think that is the way it was.

Q. And hung down on the top of the coffer-dam?

A. I think it hung on the float, or near the float. They could step on and off the float and the ladder.

Q. That would be a very dangerous thing, to put



the float on the end of the ladder, that was moving all the time?

A. They could step from the float to the ladder.

Q. Do you swear positively it was on the float?

A. No, I wouldn't, because the float would rise and fall with the tide.

Q. And it might have been on the coffer-dam, for all you know?

A. It might have been on the edge. It was near enough so they could step from the float on the ladder.

Q. You wouldn't think it would be very good judgment to put the end of a ladder on a float that was sinking up and down, where men were working on a pier?

A. We don't use that kind of judgment.

Q. (Redirect) You don't remember of sending Piltz over there to do any work, do you?

A. No, I do not.

Excused.

Mr. SENN: That is our defense, your Honor.

Portland, Oregon, April 15, 1913. 10 A. M.

Mr. GILTNER: If the Court please, Mr. Senn and I have stipulated as to the expectancy of life of Mr. Moore. His expectancy would be 23.80 years.

FREDERICK H. DRAKE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. GILTNER:

What is your position here in this court?

A. Chief deputy clerk of the United States Court.

Q. What was it on or about the 10th day of December, 1912, when this case was tried before?

A. I held the same position.

Q. I will ask you to state what you hold in your hand there.

A. I hold the drawing marked "Defendant's Exhibit A," introduced at the former trial of this case, and filed on December 12, 1912.

Q. I will ask you who has had the custody of it since that time.

A. In the custody of the clerk.

Q. Is it in the same condition now as it was then?

A. Yes, sir.

Excused.

MARY E. BELL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. GILTNER:

Miss Bell, what position did you occupy here along about December 10, 1912?

A. I was reporter in the court.

Q. Were you the reporter that reported the testimony in this case before Judge Bean, about the 10th day of December, 1912?

A. I did.

Q. I will ask you to look at this paper, and see if you saw it before.

A. Yes. This paper was given to me at the former

trial, and I marked it.

Q. And what did you mark that?

COURT: Is there any denial of that paper?

Mr. SENN: No, no denial. It was made by one of the witnesses. I don't know whom it was made by.

Mr. GILTNER: I wish to introduce it. I offer this in evidence, then, if the Court please, marked "Plaintiff's Ex. B."

Q. I wish you would turn to Mr. Alexander's testimony there, and read an excerpt there in regard to what he said as to this being a correct representation of the place of the accident on the second day of October, 1911.

A. The question was asked—

Mr. SENN: We object to that as incompetent, irrelevant and immaterial. Mr. Alexander is not a witness in this case.

COURT: Mr. Alexander is here. I think you better call him.

Mr. GILTNER: All right. Call Mr. Alexander then.

Excused.

TOM ALEXANDER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. GILTNER:

Mr. Alexander, look at that map, and state what position did you occupy with the defendant company.

A. I was engineer in charge of their work.

Q. In charge of their work?

A. Engineer in charge of the work.

Q. What?

A. I wasn't superintendent of the work. I was just the engineer.

Q. The engineer in charge of the work?

A. In that business.

Q. Look at that map, and state who made that.

A. This is a sketch I made at the former trial. Just a rough sketch.

Q. State if that was a representation of the place where this accident happened on or about October 2, 1911.

A. Well, that is just about as I remembered it. I made this map here in court.

Q. Well, you testified, did you not, the last examination, that that was practically a correct representation of the place?

A. I said that was a sketch of the place, yes. It is not a complete drawing at all. I told you that at the time.

Q. You told me what?

A. I told you that at the former trial, that it was not a drawing of the place; it was only a sketch, so that I could testify.

Q. Did you not state at that time it was practically a correct representation of the place at the time this accident happened?

A. I said that that was a sketch of the pier as I remembered it.

Q. Yes, that is all. That is right.

Cross Examination.

Questions by Mr. SENN:

Mr. Alexander, did you have Mr. Holmes make this map?

A. Yes, sir.

Q. Why did you have him make it?

A. Because this sketch was objected to in the former trial, and Mr. Giltner said that it was a frame-up on our part, and that we only had Union Bridge Company witnesses; so I went outside and got a man that I thought was not interested on either side; and I went to Mr. Holmes, the engineer for Modjeski, and asked him if he would draw a sketch, or a map, showing the pier, from his notes.

Mr. GILTNER: That is what he testified to.

A. Well, yes, we have his testimony. That is the reason I got Mr. Holmes.

Q. Were you present at any time when he was drawing that sketch?

A. No, sir. I saw the map before it came to court, but I was not there when he made it.

Q. Did you have any notes to make a sketch from?

A. This one?

Q. Yes.

A. No, sir. I made this sketch right on the table.

Q. What is that?

A. You mean this sketch?

Q. Yes.

A. I made this in court right here.

Excused.

MARY E. BELL, recalled for the plaintiff.



Direct Examination.

Questions by Mr. GILTNER:

Miss Bell, did you report the testimony of Mr. Chalfan, a witness in the former trial?

A. I did.

Q. Did you make a copy of his testimony?

COURT: That is admitted, isn't it?

Mr. SENN: Yes.

Mr. GILTNER: Oh, no.

COURT: Didn't you have a copy of the testimony yesterday?

Mr. GILTNER: Yes, but I told you I couldn't find what he had testified to. Now I have found it, and she is going to read it.

Mr. SENN: Your Honor, if she has made a copy of that, I move to have the entire copy introduced as evidence here. I want all of it. I don't think it is fair to a witness to take a question here and there.

COURT: I think counsel can read that part of the testimony if he wants to, to the jury. But if Mr. Senn desires to read other testimony in connection with it, he has a right to do that. It is not necessary to have Miss Bell testify to that matter. You have got a copy there. Let it be admitted to be a copy, and you can read from it. You had that record yesterday, and it was admitted to be the testimony of the witness. There is no necessity of going further.

Mr. GILTNER: You admit that is a correct copy of this testimony, do you?

Mr. SENN: Just ask Miss Bell if that is the testi-



mony.

Q. Miss Bell, did you make this copy of this testimony?

A. It was made under my direction. I didn't do the actual writing of it.

Q. I will ask you if that is a correct copy of your notes of the testimony?

A. Yes; made and compared.

Mr. SENN: We have no objection to it.

Cross Examination.

Questions by Mr. SENN:

Have you also Mr. Hoffstatter's testimony transcribed?

A. I have.

Q. Have you that with you?

A. I have.

Mr. SENN: I would like to offer that in evidence.

Mr. GILTNER: I object to his offering all of Hoffstatter's testimony. This is for the purpose of impeachment.

COURT: You have identified Mr. Hoffstatter's testimony?

A. I have it here with me.

COURT: You want that to use?

Mr. SENN: I want it introduced in evidence, so we can refer to it at the time of the argument to the jury. That is all.

Mr. GILTNER: I object to it. The object of this testimony really is for the purpose of impeaching these two men. And I am only entitled under the law,

as I understand it, to read that part of the testimony which I called their attention to. To introduce all their evidence before this jury would not be proper.

COURT: Both these witnesses have been here in court, and they have been called to testify. That ought to be the testimony before the jury. But if they have made contradictory statements, the former testimony can be introduced to impeach those statements, if the parties desire to do so. But beyond that I do not think the testimony should be introduced in evidence, unless both parties will agree to it.

Mr. SENN: It is agreed that Chalfan's testimony shall be introduced, is it not?

Mr. GILTNER: No, not except to contradict what I put in.

COURT: I think you can read any part of Chalfan's testimony that will explain what Mr. Giltner reads.

Mr. GILTNER: Yes, in explanation, I have no objection to that. Thank you, Miss Bell.

Excused.

Mr. GILTNER: The first part of this testimony I desire to read is a question there yesterday, your Honor, where I asked him in regard to whether he didn't testify that he came off the float, and that Mr. Moore came off the float, and went away. I have found that now, and I want to read it to the jury.

Mr. SENN: Objected to, your Honor, as having been gone into fully, and he read to the jury several times, the witness was on the stand, and it is not proper rebuttal.

COURT: I think you said that that was found in the examination in chief, and also in the cross-examination. You found what was stated in the examination in chief and read that part of it, and you said then that it was better in the cross-examination.

Mr. GILTNER: Well, now, I have found this testimony.

COURT: That on cross-examination?

Mr. GILTNER: Yes.

COURT: Very well.

Mr. GILTNER: This is the testimony of Chalfan, in answer to the questions of the Court—Judge Bean:

“COURT: Where were the boys? A. They were over on the coffer-dam. You see there was a gravel pile up where it had come out, in on the opposite side, and to the river side, where we could walk around there. It run in there quite a little bit. We were digging out around this supply shaft and the main shaft so they could get the plates out, about that much water, I should judge (indicating) and they would have to get their hands down in there; some had rubber boots, some didn't; plenty of rubber boots to put on. Mr. Moore was going over there and he couldn't get across and I told him to get a board to get across. Pretty soon then I hollered to the engineer to give us a pull; we had come up and hitched on to the other side on the coffer-dam; we pulled on that; I got where I could see him and give the signal. Q. Give who a signal? A. The engineer on the barge. Q. Where was this barge? A. It was sitting on the outside piers. Q. Just on the other side of the coffer-dam

from you? A. Yes, sir. Then I passed Mr. Moore sitting on the shore with his shoe off. I says 'What is the matter with you, Tom?' He says he stuck a nail in it, so I went on over; then I went across to the barge, and I think I unhitched, if I remember right. I done the unhitching while the other boys were getting ready to get the supply shaft out. He came out on the end of the barge where I was and said his foot pained pretty bad; I said for him to go on over to the office and have it attended to."

Now, on cross examination, showing what he testified to in regard to where Moore came from, and how he came:

"Q. Do you know how he got from this pier over to where the board was? A. I do not. He was here when I told him to get the board. Q. You don't know how he got over there, do you? A. I do not. Q. Where were you when you gave him the order to go and get it? A. Was where the double crosses are. Q. Where was he when you gave him the order? A. He was right there on the shore. Q. On the shore? A. Yes, sir. Q. But what was he doing on the shore there before you gave him the order to go there? A. He came around by the float. Q. What did he go there for? He was acting under your orders, wasn't he? A. Yes, sir. Q. What was he doing over on this bank here? The work was being done on the pier here? A. It was. Q. The men were working here? A. Yes, sir. Q. Now, if he was over here on the bank when you saw him and when you gave him the order, he wasn't acting under your instructions

at that time, was he? A. He had no boots to work on there. He came and asked me what to do. I told him to get a board and work on the inside. Q. He did come from here? A. He had come from this way then; came by me; passed me. Q. Didn't you just state to this jury you didn't know how he got to this pier—to this bank? A. Not when carrying the board, the second time. Q. That was the first time. Didn't you make the statement you didn't know how he got from this pier over there—you didn't know? Didn't you make that statement? A. Well, he passed me here, going here. Q. Didn't you make that statement to this jury? You didn't know how he got from that pier over on the bank there? A. I might possibly. Q. Now, you have changed your testimony and recall now that you do know, don't you? Mr. Senn: I don't think the witness testified to that at all. Mr. Spencer: I don't think he has changed his testimony. Q. That is a question for the jury. Now, isn't it a fact that Mr. Moore was on this coffer-dam here, and you were here, and you ordered him to go over and get the board to bring over here? A. I was not. Q. Isn't it a fact you ordered him to bring a board from here over on the coffer-dam? A. It is. Q. What? A. It is. Q. And what did you have him bring that board over there for? A. To work on. Q. To work on? A. Yes, sir."

Now, this is testimony, asked Mr. Chalfan by Judge Bean, in regard to the distance from the center part of the coffer-dam to the bank of the river:

"COURT: How far was the east line of this cof-



fer-dam from the east bank of the river; I mean from the water on the east bank of the river? How much space was there between the coffer-dam and the edge of the water? A. Well, now, I should judge about ten or twelve feet; that was in the widest place, but at the corners it wasn't. But in the center it was wider, because it caved in as they dug down more."

---

Mr. GILTNER: I read now from Mr. Hoffstatter's testimony:

"Q. What was the distance from here to the bank of the river? A. Coffe-dam to the bank? Q. Yes. A. Twelve or fourteen feet; something like that. Q. That is what you think; might have been six or seven? A. I think right in here, I think the two corners was closer to the pier."

T. H. MOORE, recalled in rebuttal.

Direct Examination.

Questions by Mr. GILTNER:

Mr. Moore, you heard Mr. Chalfan testify yesterday in regard to his giving you an order to carry a board from the bank of the river to the coffer-dam, and at the time that he gave you the order he was on the bank of the river. State whether that is true or not.

A. Well, it is not all true. He was not on the bank of the river. He was on the coffer-dam, right close to where I was working at the time he gave me the orders to cross and get the plank.

'Q. Mr. Chalfan and Mr. Hoffstatter yesterday



testified that you sat on the bank of the river and took your shoe off. I wish you would state to this jury whether or not you did anything of the kind.

A. No, sir. I didn't take my shoe off until I got over on the West side, on the docks, near the office of the company, was the first I took my shoe off.

Q. Mr. Chalfan and Mr. Hoffstatter stated that Chalfan had a conversation with you, in which he asked you—that is, on the bank of the river—where you stepped on the nail, and that you said “Over there.” I will ask you if you ever had any such conversation with either of them on the bank of the river?

A. No, sir, I didn't.

Q. Did you ever have any conversation with Mr. Hoffstatter?

A. No, sir.

Q. Did you state what time this accident happened that day?

A. The accident happened?

Q. Yes.

A. About nine o'clock in the morning.

COURT: What time did you go to work?

A. 7:30.

COURT: 7:30?

A. Yes, sir.

Q. The testimony of several of the witnesses here, whose names I cannot remember, stated that this float that was north of the pier was tied.

COURT: He testified about that in the examination in chief—this witness did.

Mr. GILTNER: Do you remember that he did,

Judge?

Mr. SENN: He testified that it was not tied; that it was loose.

Q. Will you state, then, how they got from the float to the coffer-dam?

A. Well, they couldn't get across that way; but I have seen plank laid from the float over to the coffer-dam, and crossing to and fro, getting off on the raft, crossing on the East side of the river. I have seen times that there were plank laid from the raft over to the coffer-dam, a space four to six feet.

Q. Mr. Moore, Hoffstatter and Mr. Chalfan testified that there was a scow with a donkey-engine on it that morning at that place.

A. There was not.

COURT: Didn't he testify to that on examination in chief?

Mr. GILTNER: No.

A. There wasn't anything like that there in the morning while I was there.

Q. They also testified that they were pulling off the frames. What is the fact about that, while you were there?

A. They wasn't pulling no frames while I was there. We was simply shoveling the gravel away from those planks, working to get down to where they was connected.

Q. They also testified—some of the witnesses testified; I think it was Mr. Holmes—that there was dry land near the center of this pier.

COURT: He was asked about that.

Mr. GILTNER: Did we?

COURT: Yes.

Mr. GILTNER: I believe that is all. Take the witness.

Cross Examination.

Questions by Mr. SENN:

You didn't take your shoe off until you got over to the office?

A. No, sir.

Q. You went down and took the boat, and went in a boat across the river, and walked up to the office, and then took your shoe off?

A. I didn't go down. I came right off the cofferdam onto the boat, and I was taken across the river.

Q. You didn't look at your foot or your shoe until after you got there?

A. I looked at the bottom of it, and I knew it hurt me—it run in deep—when I pulled it off.

Excused.

Mr. GILTNER: That is all our testimony.

COURT: Do you rest?

Mr. GILTNER: Yes.

COURT: Do you rest, Mr. Senn?

Mr. SENN: We rest, your Honor. We have nothing more to offer at this time.

Mr. SENN: Your Honor, at this time I want to make a motion for a directed verdict, on the following grounds:

First, that there is not sufficient testimony or evidence of negligence to be submitted to the jury.

Second, that the evidence shows that this was not a staging or a platform of any permanent nature, and the testimony shows that there were three or four or five planks thrown side by side—so Mr. Moore testified; that they were not spiked nor nailed down; that they were two or three inches apart, and were lying there loose; that the planks were about twelve feet long, and that they were thrown on a log that projected out from the bank; that that testimony, your Honor, does not make out an appliance or a place or sidewalk, or staging, or platform such as this company would be responsible for. That was Mr. Moore's testimony, and was the only testimony in this case as to what was there from his standpoint. Now, your Honor, to say that, when you put two or three or four planks side by side—even admitting his testimony for the sake of the argument—that that constitutes a staging or platform without being bolted down or spiked down, or nailed, and they were of that form lumber that was lying all around there—that that would constitute a staging, or platform, or appliance that was furnished by the employer or the master, it seems to me would be going a long way. Not only that, but if there is any testimony here at all of who did this, it was the work of fellow-servants; if anybody put that there, it was some men who simply threw the boards together there, and walked out; and for the negligence of the fellow-servant the company would not be responsible.

Third. That it was one of those risks which he assumed, because at the time of the accident, your Hon-

or, they were engaged in cleaning up, breaking down and taking away the debris, and they were cleaning that stuff up; and where men are engaged in cleaning up, and preparing, and breaking down, there is no law as to a provision of a safe place, and certainly there is no rule providing that safe scaffolding shall be used or made, because at that time they were engaged in the very work of tearing that down. And furthermore, the company had provided a float for him to go upon—a safe place, where they had always gone, where he could have gone, and where he is supposed to have gone—and whenever he took any other way, and was injured by his own negligence, the company was not responsible.

COURT: I will overrule the motion.

Mr. SENN: Save an exception.

**[Instructions to the Jury.]**

Gentlemen of the Jury:

The Court will instruct you touching the law of this case. The issues are very few. The plaintiff sets up in effect that the defendant, the Bridge Company, had in its possession and control a certain staging that was used for the purpose of the workmen to pass to and fro from the bank to the coffer-dam, and it is contended that the defendant maintained that staging for that purpose; and furthermore it is alleged that that staging was constructed of certain boards taken from the forms used for putting the cement in place in the piers, and that those boards were colored by light color from the cement, and that



one of the boards contained a nail which protruded above the board itself; that the plaintiff, while using that staging, and under a request from the foreman to go across upon the bank and get a board, after he had procured one board and gone back after another, returning with that, stepped on this nail, and the nail protruded through the sole of his shoe and into the bottom of his foot, and thereby he was injured. Now, this is the special allegation of the complaint, and it is alleged that the defendant was negligent in this respect, in using a board of that kind with a nail protruding through it, and leaving it in place for the workmen to pass to and fro upon, and that by reason of so negligently leaving the board in that shape, it allowed the plaintiff to step on the board while using the passageway, and he was injured thereby.

This accident is alleged to have occurred on the 2nd day of October, 1911.

Now, this is the plaintiff's cause of action, and the plaintiff must recover upon this cause, or not at all. He cannot recover upon a cause not alleged in the complaint, and hence he must be confined to the allegations of the complaint for the establishment of the cause of action.

Now, the defense denies, first, that it maintained this staging as a passageway for the workmen. That is a denial, and makes one of the issues in the case. It is claimed further on the part of the defendant that the plaintiff was not hurt on this staging at all, but that he was hurt while upon the bank, in the performance of some duty in getting a board for use at the



coffer-dam, and that while on the bank he stepped on a nail there, and was injured in that respect.

Now, these constitute the simple issues of this case for you to determine.

The defendant sets up, furthermore, three other affirmative defenses. One is that the plaintiff assumed the risk of his employment, and that this was one of the risks of the employment; second, that the accident was due to the carelessness and negligence of the plaintiff himself, and hence that the defendant would not be liable if such was the case; and, third, that the accident was due to the carelessness and negligence of a fellow-servant of the plaintiff, and hence that the plaintiff cannot recover.

Now, such are the issues that you have to deal with and to which you have to give consideration.

The ground of the action is the alleged negligence of the defendant in using the staging in the condition-specified. The plaintiff in this regard has the burden of proof. And what we mean by the burden of proof is that he must make out his case by some preponderance of evidence. If he makes out his case by the weight of the evidence, by some preponderance however little it may be, then he would recover. If the evidence is exactly equal, he could not recover, because there would be no preponderance.

Now, negligence, gentlemen of the jury, may be defined as the doing of some act that a reasonably prudent and careful man would not do under the circumstances, or the omission to do some act or thing which a careful and prudent man would ordinarily

do under the same circumstances.

The employer is not an insurer against accident, but it devolves upon the employer to use all ordinary care and circumspection to provide a safe place in which his workmen are to do their work. The employer is not required absolutely to provide a safe place in which the workmen can work; but he is to use due and reasonable care and precaution to see that his workmen have such a safe place in which to perform their work. When the employer has exercised due and careful attention looking towards the safety of his workmen, then he has discharged all of his duty to the workmen.

Now, with this preliminary, you will first consider whether or not the defendant maintained this passageway, or the staging, as it has been called for the purpose, of use by the men. It is alleged in the complaint that the defendant was in possession of, and in control of a certain staging, and it has been urged at the trial that the defendant maintained that staging for the use of the men. Now, gentlemen of the jury, it is for you to determine whether or not the defendant in fact did control or maintain this staging for the use of the workmen, to cross to and fro from the bank to the coffer-dam. This is a question of fact in the case for your determination, because if the defendant did not attempt to maintain such a staging, did not attempt to control it, or did not attempt to have the men cross to and fro upon that staging, then the defendant would not be liable. It is in evidence here that there was another way provided for the

men to get to and from the shore to the coffer-dam. That was by the float, and up a stairway that was built upon the side of the bank. There is evidence here, somewhat contradictory, as to whether the float was connected with the pier or not; but there is evidence tending to show that there was a way by which the men could pass from the coffer-dam to the bank. Now, it was not obligatory upon the defendant company to maintain more than one way to get to the bank, if it did not so desire; and it was not obligatory upon the defendant company to maintain this staging and provide a way for the men to get to shore from the coffer-dam to the bank over that way. And so it is for you to determine whether or not the defendant company attempted, of its own accord and for the purpose of the use of the men, to provide a way over the staging, or a crossing at that point, for the men to pass to and fro. If you find that the defendant company did attempt to maintain such a way, then that is the end of this case, because the plaintiff must recover by reason of the allegation that the defendant company attempted to provide a way across at that point for the use of the men. If they did not attempt to do that, or did not assume to provide a way at that point, then that is the end of this case, and you will have to find for the defendant.

If, however, the defendant company did undertake to provide and maintain a way at that point, then it will be for you to determine another question which arises by the allegation of the defendant itself, that the plaintiff was not hurt on this staging, but was

hurt upon the bank; and you will determine from all the evidence in this case whether or not that allegation is true.

If the plaintiff was upon the bank at the time he ran the nail into his foot, or stepped upon the nail which protruded into his foot, why, then the defendant must prevail in this case, because the plaintiff has not made out the case alleged in the complaint. And that is a matter for you to determine.

Now, in this connection I will say to you that, as I have indicated before, it was not incumbent upon the defendant company to provide a crossing at this particular point for the use of the men. If the men themselves, in the work of stripping the pier of the forms thereon, threw these boards out upon the other side and upon the bank, and if they themselves, without the knowledge or consent or the direction of the defendant, provided themselves a crossing there, temporary crossing, why, that would be a matter that the defendant company would not be liable for. And if the men used such a crossing, that was temporarily provided by the men themselves, without the knowledge, without the consent or authority, or without the direction of the defendant company, then the plaintiff would have assumed the risk of the use of that crossway as he assumed the risk of his work, or being upon the bank itself, if you find that he was hurt upon the bank.

The employee always assumes the ordinary risks incident to his employment; and in this case, if he was injured on the bank, or if he was injured on a tempo-



rary crossing that was provided by the men themselves, without the knowledge or without the direction of the defendant company, then that would be a risk that he assumed by his employment.

So far as the defense is concerned, as it is alleged that the plaintiff assumed the risk of his employment, what I have said to you will explain all there is in this case respecting the assumption of risk. If the defendant attempted to maintain this crossway, it was the defendant's duty to use due care and precaution to see that it was in order, and the plaintiff would not assume any risk as to the crossway which was provided by the defendant company, if it did so provide a crossway.

As to the defense of carelessness or negligence on the part of the plaintiff, there appears to be no evidence in this case upon which to present that issue to you. All the evidence of care and circumspection on the part of the plaintiff is found in what the plaintiff himself testified to, and in that evidence there appears to be no part of it from which an inference may be drawn that he himself was negligent or careless.

And so with the fellow-servant defense. There is no evidence here to indicate, or from which an inference may be drawn, that any fellow-servant of the plaintiff contributed to his injury, or did a careless act or thing which resulted in his injury. Hence that defense I think not to be in the case.

Now, gentlemen of the jury, you are the judges of the effect of the evidence in this case. The court gives you the law, but you must determine as to the

effect of the evidence and what the facts are. You must determine as to the credibility of the witnesses and the weight of the testimony. You determine as to the credibility of the witness from the manner in which the witness testifies upon the stand, how he demeans himself while there, and how he answers and refrains from answering questions, or whether he seems to be fair and candid in what he is telling. The weight of testimony is not always determined by the number of witnesses that may testify to a certain fact. It might happen that a number of witnesses testifying to one fact would not impress you as strongly as one or two testifying to the same fact. You must be governed by the impression or conviction that the testimony brings to your mind, whether it is testified to by few or by more witnesses.

A witness is presumed to speak the truth, but that may be overcome by the manner in which he testifies and by evidence given that will discredit his testimony. And in this connection, I may say to you that a witness who is false in one thing is to be distrusted in all; and in determining the credibility of the witnesses you may take into consideration the interest the witness may have in the controversy in hand.

I will say to you also in this connection, that what I have said or may have indicated at any time, from which you can draw an inference that the court has an opinion in the case one way or the other on the question of fact, you must disregard altogether, and



find according to the bearing and conviction which the testimony has brought to your minds.

And I will further say that in this case a motion was made in your presence asking the court to direct a verdict for the defendant. The court of course passed upon that motion, and denied it, but that incident or circumstance should not have any bearing upon your minds in the case. The court only passed upon a question of law, and you are dealing with a question of fact.

Now, the measure of damages, I will give you from Judge Bean's instruction in the former case:

If you find, under the rules as I have given them to you, that the defendant company is liable to the plaintiff, then it will be necessary for you to ascertain and determine the amount of money that he is entitled to recover as a compensation for the injury. In doing this you have a right to consider his age, which is 46 years. His expectation of life, or his probable length of life, according to the experience of persons versed in such matters, is 23.80 years. You have a right to take that into consideration. You also have a right to consider the pain and suffering incident to this injury, the time the plaintiff was confined to the hospital, his loss of employment, his impaired ability, and, taking all these into consideration, ascertain and determine what, in your judgment, would be a fair and reasonable compensation to him for the injury, if you believe it due to the fault or negligence of the defendant company.

If there is anything I have overlooked, I would be glad to hear it.

Mr. GILTNER: Simply this, your Honor: In order to get it clear before the jury, I wish you would instruct the jury that where the master undertakes by his laborers to make a place for the servants to work, then the laborer in making that place to work acts as the vice-principal, and his act is the act of the master, if he fails to make it a reasonably safe place in which to work.

COURT: I have already stated to the jury that if the defendant company maintained this way, and I will say further, if it maintained it by itself, or through its foreman or superintendent.

Mr. GILTNER: Yes, that is all I care for.

COURT: They understand that. I thought I made it plain. Are there any exceptions to the charge?

Mr. SENN: No, your Honor. We are satisfied.

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[Endorsed]: Filed June 4, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 4 day of June, 1913, there was duly filed in said Court, a Petition for Writ of Error in words and figures as follows, to wit:

**[Petition for Writ of Error.]**

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

THE UNION BRIDGE & CONSTRUCTION  
COMPANY, A CORPORATION.

Defendant.

The Union Bridge & Construction Company, a corporation, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment in the above entitled action, entered on the 17th day of April, 1913, by which it was adjudged that said plaintiff take judgment against this defendant in the sum of Nine Thousand (\$9000.00) Dollars, and costs, comes now by its attorney, F. S. Senn, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeal for the 9th Circuit, under and according to the laws of the United States on that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this Court be suspended and stayed until the determination of said writ of error, and your petitioner will ever pray.

F. S. SENN,

Attorney for defendant.

[Endorsed]: Petition. Filed June 4, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 4 day of June, 1913,  
there was duly filed in said Court, Assignments  
of Error in words and figures as follows, to wit:

**[Assignments of Error.]**

*In the Circuit Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

Now comes the defendant above named and in connection with its petition for writ of error in the above entitled action suggests that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and defendant makes this, its,

**ASSIGNMENT OF ERRORS**

**I.**

That after the introduction of all the testimony on the part of both the plaintiff and defendant, the defendant moved the Court for a directed verdict on the following grounds:

"Mr. Senn: Your Honor, at this time, I want to make a motion for a directed verdict, on the following grounds:

First. That there is not sufficient testimony or evidence of negligence to be submitted to the jury.

Second, that the evidence shows that this was not a staging or platform of any permanent nature, and the testimony shows that there were three or four or five planks thrown side by side—so Mr. Moore, testified; that they were not spiked nor nailed down; that they were two or three inches apart, and were lying there loose; that the planks were about twelve feet long and that they were thrown on a log that projected out from the bank; that that testimony, your Honor, does not make out an appliance or a place or sidewalk or staging, or platform such as this company would be responsible for. That was Mr. Moore's testimony and was the only testimony in this case as to what was there from his standpoint. Now, your Honor, to say that, when you put two or three or four planks side by side—even admitting his testimony for the sake of the argument—that that constitutes a staging or platform without being bolted down or spiked down, or nailed, and they were of that form lumber that was lying all around there—that that would constitute a staging, or platform or appliance that was furnished by the employer or the master, it seems to me would be going a long way. Not only that, but if there is any testimony here at all of who did this, it was the work of fellow servants; if anybody put that there, it was some men who simply threw the boards together there, and walked out, and for the negligence of the fellow servant the company would not be responsible.



Third. That it was one of those risks which he assumed, because at the time of the accident, your Honor, they were engaged in cleaning up, breaking down and taking away the debris, and they were cleaning that stuff up; and where men are engaged in cleaning up, and preparing, and breaking down there is no law as to a provision of a safe place, and certainly there is no rule providing that safe scaffolding shall be used or made, because at that time they were engaged in the very work of tearing that down. And furthermore, the company had provided a float for him to go upon—a safe place, where they had always gone, where he could have gone, and where he is supposed to have gone—and whenever he took any other way, and was injured by his own negligence, the company was not responsible.

Court: I will overrule the motion.

Mr. Senn: Save an exception."

That said motion was overruled and an exception allowed by the Court. That the Court erred in overruling said motion for a directed verdict.

## II.

That after the verdict was rendered in the above entitled action the defendant filed a motion for a new trial on the following grounds:

"First: Excessive damages appearing to have been given under the influence of prejudice and passion."

Second: Error in law occurring at the trial and excepted to by the party making this motion, and in



support of said motion the defendant herein presents the testimony taken at the time of said trial, and the whole thereof, and presents its authorities and brief."

That said motion after due argument was overruled. That the Court erred in overruling said motion and duly allowed an exception to its order allowing said motion to be overruled.

F. S. SENN,  
Attorney for Defendant.

[Endorsed]: Assignment of Errors. Filed June 4, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 4 day of June, 1913, there was duly filed in said Court, an Order, in words and figures as follows, to wit:

**[Order Allowing Writ of Error.]**

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

On this 4th day of June, 1913, came the above named defendant by F. S. Senn, its attorney, and filed herein and presented to the Court its petition praying

for the allowance of a writ of error, intended to be urged by the defendant, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on the 17th day of April, 1913, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may appear proper in the premises.

On Consideration whereof the Court does hereby allow the said writ of error and that citation issue as by law provided.

It is further ordered that the amount of the supersedeas bond to be given by said defendant be and the same is hereby fixed at the sum of Eleven Thousand Dollars with good and sufficient surety to be approved by this Court which bond now being filed with the Aetna Accident and Liability Company, as surety is hereby approved and execution issued herein is recalled and stayed.

Dated June 4, 1913.

CHAS. E. WOLVERTON,  
Judge.

[Endorsed] : : Order. . Filed June 4, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 4 day of June, 1913, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Undertaking on Appeal.]

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:  
That we, the Union Bridge and Construction Com-  
pany, a corporation of the State of Missouri, as prin-  
cipal and The Aetna Accident & Liability Company  
of Hartford, Connecticut, as surety are held and  
firmly bound unto T. H. Moore, in the sum of Eleven  
Thousand Dollars, to be paid to the said T. H. Moore,  
for the payment of which, well and truly to be made,  
we bind ourselves, our successors and assigns, jointly  
and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of  
June, 1913.

Whereas, the above named Union Bridge and Con-  
struction Company has applied for and obtained a  
writ of error to the United States Circuit Court of  
Appeals for the Ninth Judicial Circuit, to reverse the  
judgment rendered in the above entitled cause by the  
District Court of the United States for the District of  
Oregon.

Now therefore, the condition of this obligation is  
such that if the said Union Bridge and Construction

Company shall prosecute said writ to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

UNION BRIDGE & CONSTRUCTION COMPANY,

By F. S. SENN,

Attorney in Law and in Fact.

THE AETNA ACCIDENT & LIABILITY COMPANY,

By W. E. PEARSON,

Its Resident Vice President.

Attest: F. S. SENN,

Its Resident Assistant Secretary.

THE AETNA ACCIDENT & LIABILITY COMPANY,

By McCORGER, BATES & LIVESLY,

Its Local & General Agents.

By W. E. PEARSON,

Member of Firm.

The within bond is hereby approved this 4th day of June, 1913.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Bond. Filed June 4, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 12 day of June, 1913, there was duly filed in said Court, a Writ of Error, in words and figures as follows, to wit:

[Writ of Error.]

*In the United States Circuit Court of Appeals  
for the Ninth District.*

THE UNION BRIDGE & CONSTRUCTION  
COMPANY, A CORPORATION.

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

THE UNITED STATES OF AMERICA—ss.

THE PRESIDENT OF THE UNITED STATES  
OF AMERICA.

To the Judge of the District Court of the United  
States for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Chas. E. Wolverton, one of you, between T. H. Moore Plaintiff and Defendant in Error, and Union Bridge & Construction Co., Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD DOUGLAS WHITE,

Chief Justice of the Supreme Court of the United States this 12th day of June, 1913.

(Seal)

A. M. CANNON,

Clerk of the District Court of the United States for the District of Oregon.

[Endorsed]: Writ of Error. Filed June 12, 1913.

A. M. CANNON,

Clerk United States District Court.

And afterwards, to wit, on the 14 day of June, 1913, there was duly filed in said Court, a Citation on Writ of Error in words and figures as follows, to wit:

**[Citation on Writ of Error.]**

UNITED STATES OF AMERICA,

District of Oregon.—ss.

To T. H. Moore, defendant in error, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Ap-



peals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein The Union Bridge & Construction Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 13th day of June, in the year of our Lord, one thousand, nine hundred and thirteen.

CHAS. E. WOLVERTON,

Judge.

**[Affidavit of Service.]**

State of Oregon,

County of Multnomah.

I, F. S. Senn, being the attorney for the defendant in the within matter, hereby certify that I did on this 13th day of June, 1913, serve the within Writ of Error on the attorneys for the plaintiff in the within matter by leaving at the office of Giltner and Sewall, 1125 Yeon Building, Portland, Oregon, a true and correct copy and the whole thereof, of the within Writ of Error. That said Giltner & Sewall, are the attorneys of record of the plaintiff within, and that said certified copy of the within was left with the stenographer in the office of said Giltner and Sewall, with the request that said certified copy be delivered to

said Giltner & Sewall immediately upon their return to their said office. That both of said attorneys were absent from their said office when this affiant called to serve said Writ.

[Seal]

F. S. SENN.

Subscribed and sworn to before me this 13th day of June, 1913.

LOUIS A. RECKEN,  
Notary Public for Oregon.

[Endorsed]: Citation on Writ of Error. Filed June 14, 1913.

A. M. CANNON,  
Clerk.

And afterwards, to wit, on the 23 day of June, 1913, there was duly filed in said Court, an Order in words and figures as follows, to wit:

**[Order Certifying Up Exhibits.]**

*In the District Court of the United States for the  
District of Oregon.*

No. 5568.

June 23, 1913.

T. H. MOORE,

Plaintiff,

v.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

Now, at this day, it appearing that plaintiff's exhibits A and B introduced in evidence upon the trial of this cause, should be inspected by the Appellate

Court upon the appeal herein ;

It is Ordered that said exhibits A and B be certified up with the record to the United States Circuit Court of Appeals, Ninth Circuit.

And afterwards, to wit, on the 23 day of June, 1913, there was duly filed in said Court, an Order in words and figures as follows, to wit:

**[Order Enlarging Time to File Transcript.]**

*In the District Court of the United States for the  
District of Oregon.*

No. 5568.

June 23, 1913.

T. H. MOORE,

Plaintiff,

v.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

Now, at this time, good cause appearing, it is Ordered that the time for filing and docketing defendant's transcript of Record in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is enlarged and extended to and including the 1st day of August, 1913.

CHAS. E. WOLVERTON,

Judge.



No. 2313

3

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IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

---

THE UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

---

On Writ of Error to the District Court of the  
United States for the District of Oregon.

VOL. II.

---

TRANSCRIPT OF RECORD.

**RECEIVED**

AUG 29 1913

D. MONCKTON,  
CLERK

**FILED**

SEP 15 1913





No. 2316

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IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

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THE UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Plaintiff in Error,

VS.

T. H. MOORE,

Defendant in Error.

---

On Writ of Error to the District Court of the  
United States for the District of Oregon.

VOL. II.

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TRANSCRIPT OF RECORD.

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IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

---

THE UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

---

**Names and Addresses of Attorneys  
upon this Writ:**

---

**For the Plaintiff in Error:**

F. S. Senn,

Yeon Bldg., Portland, Ore.

---

**For the Defendant in Error:**

Giltner & Sewall,

Yeon Bldg., Portland, Ore.

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And afterwards, to wit, on the 22 day of July, 1913,  
there was duly filed in said Court, a Stipulation,  
in words and figures as follows, to wit:

**[Stipulation to Amend Bill of Exceptions.]**

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

It is hereby stipulated and agreed by and between Giltner & Sewall, attorneys for the plaintiff and F. S. Senn, attorney for the defendant, that whereas the Bill of Exceptions as settled, allowed and filed in the above entitled action is incorrect and fails to contain as it should and as it was intended to contain, all of the testimony introduced by both parties at the trial of said cause; and whereas, at the trial of said cause the plaintiff introduced in evidence the testimony of one J. H. Piltz and his deposition, which said testimony and deposition was read to the jury in said cause; and whereas, the plaintiff also introduced the deposition and testimony of one Carl Carlgren at the trial of said cause, which was likewise read to the jury in said cause; and whereas the said Bill of Exceptions as settled and allowed does not include the testimony or depositions of either of said witnesses;

NOW, THEREFORE, it is hereby stipulated and agreed that the said Bill of Exceptions may be amended to include the said testimony and depositions of said witnesses by inserting the same and attaching the same to and making the said testimony and depositions a part of the said Bill of Exceptions. Dated July 22nd, 1913.

GILTNER & SEWALL,  
Attorneys for Plaintiff.  
F. S. SENN,  
Attorney for Defendant.

[Endorsed]: Stipulation. Filed July 22, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of July, 1913, there was duly filed in said Court, an Order, in words and figures as follows, to wit:

**[Order Amending Bill of Exceptions.]**

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

Now, at this time comes Giltner & Sewall, attorneys for plaintiff in the above entitled action, and based on the stipulation of counsel on file herein, moves the Court that the Bill of Exceptions hereto-



fore settled, allowed and filed in the above entitled cause be amended, so as to include therein the testimony and depositions of two witnesses on the part of the plaintiff, towit: J. H. Piltz and Carl Carlgren; which said testimony and depositions were introduced in the evidence at the trial of said cause and were read to the jury; and it appearing to the Court that the said depositions and testimony should properly appear in the Bill of Exceptions, and that through inadvertence and oversight the same were overlooked and were not included in and do not appear as part of the record and proceedings in said Bill of Exceptions;

Now, Therefore, it is hereby ORDERED that the said Bill of Exceptions heretofore settled, allowed and filed in this cause be amended by inserting and attaching thereto the testimony and depositions of the said witnesses, J. H. Piltz and Carl Carlgren introduced at the trial of said cause, so that the said Bill of Exceptions shall contain a true and correct record of the proceedings had in said cause.

Dated July 22nd, 1913.

CHAS. E. WOLVERTON,  
Judge.

[Endorsed]: Order. Filed July 22, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of July, 1913, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:

**[Stipulation to Amend Transcript.]**

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

It is hereby stipulated and agreed by and between Giltner & Sewall, attorneys for the plaintiff, and F. S. Senn, attorney for the defendant in the above entitled cause, as follows: That, Whereas, the Bill of Exceptions heretofore settled, allowed and filed in said cause has been, by order of Court, amended this day, so as to include the testimony and depositions of two witnesses on the part of the plaintiff, towit: J. H. Piltz and Carl Carlgren; the same having been through inadvertence and oversight omitted from the said Bill of Exceptions; and Whereas, the Transcript of Record, this day served on the Plaintiff, contains a copy of the Bill of Exceptions as it was formerly settled, and without the amendments thereto;

Now, Therefore, it is agreed that the said Transcript of Record may be amended by attaching thereto and including therein a copy of the Amended Bill of Exceptions.

Dated July 22nd, 1913.

GILTNER & SEWALL,  
Attorneys for Plaintiff.

F. S. SENN,

Attorney for Defendant.

[Endorsed]: Stipulation. Filed July 22, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of July, 1913,  
there was duly filed in said Court, an Order, in  
words and figures as follows, to wit:

**[Order Amending Record.]**

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

Now, at this time comes F. S. Senn, attorney for  
the defendant above named, and based on the stipu-  
lation of counsel on file herein, moves the Court that  
the said defendant be allowed to amend the Trans-  
cript of Record in the above cause by attaching  
thereto and inserting therein a copy of the Amended  
Bill of Exceptions; and it appearing to the Court that  
the Court has this day allowed an amendment to be  
made to the Bill of Exceptions heretofore settled, al-  
lowed and filed, and that the printed Transcript of  
Record contains a copy of the Bill of Exceptions as it  
was formerly settled, and without the amendments  
thereto;

Now, Therefore, it is ORDERED, that the said Transcript of Record in the above cause may be amended by attaching thereto and including therein a copy of the Amended Bill of Exceptions.

Dated July 22nd, 1913.

CHAS. E. WOLVERTON,  
Judge.

[Endorsed]: Order. Filed July 22, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 9 day of April, 1913,  
there was duly filed in said Court, a Deposition,  
in words and figures as follows, to wit:

[Deposition.]

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,  
Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,  
Defendant.

It is hereby stipulated and agreed by and between the parties hereto, acting through their respective attorneys, that the deposition of Carl Carlgren, a witness on behalf of the plaintiff, may be taken in the City of New York, in the State of New York, before L. L. Pierce, at the New York County Bank, corner of 8th Avenue and 14th Street, upon the direct, cross

and redirect interrogatories hereto attached and made part hereof, and such other questions as may be asked by attorneys for either side who may be present.

It is further agreed and stipulated that said witness shall first be duly sworn to tell the truth, the whole truth and nothing but the truth; and thereafter said interrogatories shall be propounded by said L. L. Pierce to said witness and said witness shall make answer thereto; that said interrogatories, together with the answers of said witness thereto, shall be reduced to writing in the presence of the witness and said L. L. Pierce, and shall thereafter be signed and subscribed by said witness; that thereafter the said L. L. Pierce shall attach his certificate to said deposition, showing that the same was taken before him according to the terms of this stipulation, and shall issue the same under his seal and shall cause the said deposition to be sealed up in an envelope and addressed to the Clerk of the above entitled Court at Portland, Oregon; and that thereafter the said deposition may be used upon the trial by either party hereto, subject to any and all legal objections which may be interposed by either party hereto upon the trial of said action, except that no objection shall be made on the ground that the question is leading or as to the form, time, place and manner of taking said deposition, which are hereby waived.

Dated at Portland, Oregon, March 8, 1913.

(Sd) GILTNER & SEWALL,

Attorneys for Plaintiff.

(Sd) WILBUR & SPENCER,

Attorneys for Defendant.

[Deposition.]

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

Deposition of Carl Carlgren, a witness on behalf of the plaintiff, taken before L. L. Pierce, Commissioner, at No. 128 Broadway, in the Borough of Manhattan, in the City, County and State of New York, on the 28th day of March, 1913.

The said Carl Carlgren, having been first duly sworn, did depose and say:—

1st Interrogatory. Please state your name, age, residence and occupation.

Answer. Carl Carlgren; 32; Market Hotel, 405 West 13th Street, Manhattan, New York City; Carpenter.

2nd Interrogatory. Do you know T. H. Moore, the plaintiff in this action?

Answer. Yes.

3rd Interrogatory. Were you ever in the employ of this defendant while it was constructing a bridge known as the Broadway Bridge, across the Willamette River in Portland, Oregon?

Answer. Yes.

4th Interrogatory. Were you working for the de-



fendant on and before October 2nd, 1911, on the said bridge?

Answer. Yes.

5th Interrogatory. Do you know of the plaintiff, T. H. Moore, being hurt on a staging leading from the cofferdam to the bank of the river on the east end of said bridge on or about October 2nd, 1911?

Answer. Yes.

6th Interrogatory. If you answer the last question by "Yes," state, if you know of your own knowledge, how it happened.

Answer. I did not see the accident. I was working on the job about the time but I am not sure that I was working there that day.

7th Interrogatory. State, if you know, whether there was a temporary staging built from the cofferdam to the bank of the river on or about October 2, 1911?

Answer. Yes, there was.

8th Interrogatory. Describe the staging and how and of what it was made.

Answer. It was made of cement from lumber about 1½ inches thick by about 3 feet and six inches wide. This staging ran from the top of the cofferdam on to the river bank and it was about 10 or 12 feet long. I do not remember whether there were any supports under this or not. It had no railing on the side. The boards had been used for cement forms and the boards had nails sticking up in them. This is all I know about the staging.

9th Interrogatory. What was the color of the

boards that composed it?

Answer. They were discolored with cement.

10th Interrogatory. What had these boards been used for, if you know, before being used in the staging?

Answer. Cement forms.

11th interrogatory. What was the staging used for?

Answer. Used by the men taking forms off of the cofferdam and piling the planks up on the bank.

12th Interrogatory. Was there any other way of carrying lumber or timbers from the cofferdam to the bank of the river and from the bank of the river to this cofferdam, than by this temporary staging?

Answer. No.

13th Interrogatory. What were Mr. Moore and the other men sent to do on the cofferdam on the morning of the accident, if you know?

Answer. I do not know.

#### Cross Interrogatories.

Q. To which pier do you refer to in your direct examination?

A. East side pier.

Q. On what side of the cofferdam was the staging, if any?

A. On the east side.

Q. Was it on the north side of the cofferdam?

A. No, on the east side.

Q. Was not this staging used for the men to walk from the bank out to the scow and to the ladder and

was it not used for the men in going and coming from their work to get out into the river?

A. No, there was a stairway built for the men to go out from the railroad down to the river and the float at the foot of the stairway.

Q. State any other fact which might throw any light on this accident.

A. That is all I know about it.

Q. How far was the float from the cofferdam?

A. 6 or 8 feet.

Q. And the float you say was 6 or 8 feet from the bank of the river?

A. No, the float was against the river bank.

Q. How far was the cofferdam from the ladder?

A. About 30 feet from the ladder.

Q. Do you know whether there were any nails sticking up in this particular staging?

A. I do not. I do not remember.

CARL CARLGREN,

Sworn to before me this ..... day of March, 1913.

(Seal)

LEWIS L. PIERCE,

Commissioner and Notary Public  
for Kings Co., New York.

[Endorsed]: Deposition of Carl Carlgren. Filed  
Apr. 9, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 2 day of April, 1913,  
there was duly filed in said Court, a Deposition,  
in words and figures as follows, to wit:

[Deposition.]

*In the District Court of the United States for the  
District of Oregon.*

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the deposition of J. H. Piltz, a witness on behalf of the plaintiff, may be taken at the offices of Giltner & Sewall, 1125 Yeon Building, in the City of Portland, Oregon, before H. A. Van Horne, Notary Public, on the 8th day of March, 1913, between the hours of 10 o'clock A. M. and 6 P. M. or thereafter. To begin at 10 A. M.

It is further agreed and stipulated that said witness shall first be duly sworn to tell the truth, the whole truth and nothing but the truth; that said deposition shall be reduced to writing and the signing of the same by said witness shall be waived; that said deposition shall be sealed up in an envelope and addressed to the Clerk of the above entitled Court at Portland, Oregon; and that thereafter said deposition may be used on the trial of said action by either party hereto, subject to any and all legal objections which may be interposed by either party hereto upon the trial of said action, except that no objection shall

be made on the ground that or as to the form, time, place and manner of taking said deposition, which said last are hereby waived.

Dated at Portland, Oregon, March 4, 1913.

GILTNER & SEWALL,

Attorneys for Plaintiff.

WILBUR and SPENCER,

Attorneys for Defendant.

*In the District Court of the United States for the  
District of Oregon.*

[Deposition of John Piltz.]

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

BE IT REMEMBERED, that pursuant to the annexed stipulation, the said witness, John H. Piltz, appeared before me on March 8, 1913, at 10:00 o'clock a. m., at the offices of Giltner & Sewall, 1125 Yeon Building, in the City of Portland, Oregon, the plaintiff appearing by Mr. Giltner of counsel for plaintiff, and the defendant appearing by Mr. Senn of counsel for defendant.

Said witness, John H. Piltz, being first duly sworn by me to tell the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination.

By Mr. GILTNER:

State your name, age, residence and occupation.

A. John H. Piltz; age forty; residence Berkeley, California; occupation master mariner.

Q. Are you acquainted with T. H. Moore, the plaintiff in this case?

A. I am.

Q. Are you acquainted with the Union Bridge and Construction Company a corporation?

A. I am.

Q. State whether or not you were in the employ of this defendant company at that time?

A. I was in the employ of the Union Bridge Company off and on from about June, 1909, to about the middle of October, 1911.

Q. State if you were in their employ on or about the second of October, 1911.

A. I was.

Q. What position did you occupy there with these people?

A. Gang foreman.

Q. Who was superintendent over you?

A. James Dawson.

Q. Did you do any work upon what is known as the Broadway bridge across the Willamette river, in Portland, Oregon?

A. I did.

Q. State whether or not you did any work on the East end of that bridge, on the coffer dam.



A. Yes, sir.

Q. Prior to the second day of October, 1911?

A. I worked on that East pier off and on for possibly four months.

Q. I wish you would state what you did there, if anything, in regard to removing the cement forms from the piers and piling them on the bank of the river, and how it was done.

A. When other work wasn't too pressing, we used to go over to the East pier, the gang,—sometimes two or three, sometimes five or six, removing these forms off of there and take them over to the bank, and pile them up; and to make it convenient we built staging, or a platform across there out of the old boards torn down, to walk across.

Q. State whereabouts this staging was built, and state how it was built.

A. The staging was built approximately, you might say, half way between the two piers, as near as you can get it, and one end on a piece of board on the coffer dam resting on the rocks, and the other end lying on an old log, the boards laid crossways. There was a space there of some five or six feet of water.

Q. What was the color of the boards that composed this staging or runaway from the coffer dam to the river bank.

A. Ordinary boards torn off the cement; usually that class of lumber has got a whitish appearance.

Q. Who put those up?

A. I had it put up.

Q. Were you present when it was done?

A. I was around on the job, yes, sir.

Q. State under whose orders these cement forms were taken off and the staging put up.

A. My orders from Mr. Dawson were to go and remove what I got from the forms and pile it up on the beach in the quickest, convenientest way I could figure out.

Q. Were those boards piled on the beach, or scattered all over the beach.

A. They were supposed to be piled up.

Q. Were they piled up?

A. The majority were, but there was a few stray ones scattered around, because the boards were being used for different purposes, as they were demanded.

Q. What was this staging used for?

A. Just to take the boards off of the forms over to the beach.

Q. Do you remember when this was put up,—about what time, as to the second of October, 1911?

A. I couldn't say exactly; somewhereas probably a week or so previous, possibly more than a week; I don't exactly remember the date. There has been half a dozen different stagings built there at that same pier, to my knowledge, at different times.

Cross Examination.

By Mr. SENN:

What are you doing now?

A. Master Mariner, going to sea for a living.

Q. How long since you worked for the Union Bridge Company?

A. Somewheres about the middle of October, 1911.

That's all.

Witness excused.

[Endorsed]: Deposition of John H. Piltz. Filed Apr. 2, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on Wednesday, the 23 day of July, 1913, the same being the ..... judicial day of the regular July, 1913, term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Extending Time to File Record.]

*"In the District Court of the United States for the  
District of Oregon.*

No. 5568

July 23, 1913.

T. H. MOORE,

v.

UNION BRIDGE & CONSTRUCTION CO.,

Now, at this time, good cause appearing it is Ordered that defendant's time for filing the record and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same

hereby is enlarged and extended to and including August 15, 1913.

CHAS. E. WOLVERTON,  
Judge.

And afterwards, to wit, on Wednesday, the 13 day of August, 1913, the same being the thirty-third judicial day of the regular July, 1913, term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Order Enlarging Time to File Record.]**

*"In the District Court of the United States for the  
District of Oregon.*

No. 5568

August 13, 1913.

T. H. MOORE,

Plaintiff,

v.

UNION BRIDGE & CONSTRUCTION COM-  
PANY, a corporation,

Defendant.

Now, at this time, good cause appearing, it is Ordered that the time for filing and docketing defendant's transcript of Record in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is enlarged and extended to and including the 1st day of September, 1913.

CHAS. E. WOLVERTON,  
Judge.

No.

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IN THE

**United States Circuit Court  
of Appeals**

NINTH CIRCUIT

---

THE UNION BRIDGE & CONSTRUCTION COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

---

**Plaintiff in Error's Brief**

---

IN THE

**United States Circuit Court  
of Appeals**

NINTH CIRCUIT

---

THE UNION BRIDGE & CONSTRUCTION COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

---

NAMES AND ADDRESSES OF ATTORNEYS  
UPON THIS BRIEF:

FOR PLAINTIFF IN ERROR:

F. S. SENN,

Yeon Bldg., Portland, Ore.

---

FOR DEFENDANT IN ERROR:

GILTNER & SEWALL,

Yeon Bldg., Portland, Ore.



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## STATEMENT OF THE FACTS.

At the time of the accident the plaintiff-in-error was constructing a sub-structure of a bridge across the Willamette River at Portland, Oregon. This work consisted of sinking several concrete piers into the bed of the river. One of these piers was located near the east edge of the river. This particular pier was some thirty-five feet deep under the surface of the ground and projected twenty feet into the air. Around this pier there was built what is known as a coffer dam. This coffer dam is an outer casing made of lumber which is constructed around the cement pier. The coffer dam is water-tight and its purpose is to keep the water away from the cement pier while the men are sinking the pier. The coffer dam was sixty-eight feet long and twenty feet wide. The cement pier was sunk inside of this coffer dam and was something like sixty feet by fifteen feet. This coffer dam was constructed of timbers laid on top of each other, which timbers were bolted and nailed together. The timbers were about 12x12 inches square. From the ground up to the top of the cement pier a lumber casing or form had been constructed. This casing or form was made of some 2-inch planks, thoroughly bolted, into which the cement was poured and in this way the cement pier was projected into the air until the necessary height was reached.

At the time of the accident to the defendant-in-error herein, the concrete work on this pier had been finished and the defendant-in-error and several of the other employees of this plaintiff-in-error were engaged in tearing down this form or outer casing of the pier and in pulling out the timbers

which were built around the cement pier and which comprised part of the coffer dam. The employees at the time of the accident had torn off all the planking to the level of the water or ground. For this purpose they were using crowbars, picks and also a donkey engine. Whenever a plank was so solid that they could not break it loose with a crowbar or pick, they fastened the end of a chain to it and by means of the donkey engine pulled the plank or sill from its fastenings. After the planks were torn loose, the employees would sometimes carry them to the bank. Other times, if they would drop into the water, they would be towed around the coffer dam. At the time of this accident, which occurred on October 2nd, 1911, this defendant-in-error was engaged in helping dismantle this coffer dam and at the time of the accident testified that he was carrying planks from the bank onto the coffer dam. He stated that this distance from the coffer dam to the bank was some six or seven feet and that there was some water there and that some planks had been thrown lengthwise of the coffer dam for him to walk upon. He stated that these planks were lying there when he started to work and that while walking across these planks he stepped on a nail which punctured his shoe and went into the ball of his foot, from which blood-poison resulted and later on the ball of his foot was amputated thru the instep. The plaintiff explained of what these planks consisted of, referring to page 39 of the Transcript of Record.

Q. You spoke of a log coming out here (meaning the coffer dam). Did it come clear from the bank to the coffer dam?

A. No, sir, it did not reach to the coffer dam by a foot and a half or such matter.

Q. These planks were thrown on this log?

A. Yes, the north end of these planks lay on that timber.

Q. And this staging was about how far from the coffer dam?

A. I presume about a foot and a half.

Q. And how far was it from the bank of the river on the other side?

A. Well, the water was very shallow there from the bank—it was probably two feet.

Q. Then you would step from the coffer dam onto these loose planks that were thrown across the log?

A. Yes, sir.

Q. And walk across four or five, you say?

A. Yes, sir.

Q. And then you would step a distance of two feet on the bank?

A. It would probably be two feet, I don't know exactly.

Q. There would be water between the staging and the bank, a little?

A. The planks were not erected close together or anything. They were probably two or three inches apart—something like that. They wasn't placed up close together.

Q. Were they in perfect line or scattered around?

A. Oh, yes, they were in perfect line.

Q. But they were not spiked down or nailed down, or anything like that?

A. No, sir; they wasn't spiked down.

Q. Do you know how they got there?

A. No, sir.

On page 43 of this Transcript of Record we have the following questions:



Q. Now, you say these planks here, there were four or five of them, how wide were they?

A. Well, they were 2x6 or 2x8. I wouldn't say positively which.

Q. That is, they were 6 or 8 inches wide?

A. Inches wide—yes, sir.

Q. And they were just laid side by side?

A. Yes, sir.

Q. Loose on these poles?

A. Yes, sir.

This was the only testimony as to the nature of this so-called staging upon which the plaintiff claims he was injured. All the witnesses for the defendant—and there were four in number—stated that there was no staging there of any description.

Chalfan and Hofstetter, the two employees who worked with the injured party at the time of the accident, both testified that the injured stepped on a nail on the bank, and the engineer for the City of Portland stated that he came along there at about the time of the accident and saw the injured sitting on the bank with his shoe off. This the injured also denied. All the witnesses, including the injured, testified that the plaintiff-in-error did have a regular plankway, bolted down with a railing on it on the north side of this coffer dam. This was the staging provided by the bridge company for use by its employees and all the witnesses, except the injured man, stated that this was the one which was used to carry planks on and for ingress to and egress from this coffer dam.

From this testimony of the plaintiff—and he was the only witness that testified about the staging upon which he was injured—it appears that there were four or five planks from 12 to 14 feet long, 6 to 8 inches wide and 2 inches thick laid flat



on the ground at one end and the other end was laying on an old decayed log which projected out from the bank toward the coffer dam. He stated that the planks were not close together, some of them were two or three inches apart. That they were of different lengths; that they were not even, nor were they nailed or stationary.

There was a deposition introduced in evidence from a witness Piltz, who stated that he had built four or five stagings around this coffer dam prior to the time of the accident. He said that four or five men under him and himself went over to this coffer dam and built stagings around it at various times prior to the time of the accident and the witness Carlgren, whose deposition was also introduced, testified that there were stagings around this coffer dam. The Bridge Company does not contend that there were no stagings around this coffer dam. The testimony showed—and no doubt, the fact was—that while this coffer dam was in the course of construction, many stagings were built. Plaintiff-in-error claims that this staging testified to by Moore, the injured, could not possibly have been the staging erected by Piltz, as Moore testified that it was simply four or five planks that were taken from this coffer dam and thrown on the ground. After the introduction of all the testimony, the plaintiff-in-error moved for a directed verdict on the following grounds:

(1) That there was not sufficient evidence of negligence to be submitted to the jury.

(2) That this platform or walkway upon which the injured testified he was injured was not of a permanent nature, as it was merely three or four planks thrown side by side by the employees them-

selves, and even though there was a nail in one of these planks, the plaintiff-in-error was not responsible for such a condition.

(3) That at the time of the accident the injured with his fellow-employees were engaged in carrying out a detail of work. They were tearing down the casing or coffer dam and that while engaged in that work they were fellow-servants, and if some of the employees threw these planks down for the men to walk upon, it would be an act for which the Bridge Company is not responsible and that the rule of a reasonably safe place to work would not apply to this case, as the employees were making their own place to work.

This motion, after extended argument, was overruled, and a verdict was returned by the jury for the sum of \$9000.00 in favor of the injured party. A motion for a new trial was then made on the two grounds:

(1) That the verdict was excessive.

(2) That the Court erred in refusing to direct a verdict. This motion was also denied.

The testimony further showed that the injured was a single man, forty-six years of age and was earning approximately \$80.00 per month. That he had worked in and about this bridge for several months prior to the accident and that he was a man of considerable experience in and about bridge work.

### **POINTS AND AUTHORITIES.**

“The injured party and his fellow-employees at the time of the accident were engaged in carrying out a detail of work. The pier had been completed and they were tearing down the forms, taking out the pipes and in doing this work, the lumber was

scattered around the coffer dam, all of which, no doubt, had nails in it, and the Bridge Company owed the injured party no duty in regard to a reasonably safe place for the reason that the injured and his fellow-employees were making their own place."

Subbo vs. Pacific Coast Construction Co., 133 Pac. 83.

Kreigh vs. Westinghouse, Church, Kerr & Co., 152 Fed. 120.

The plank upon which the injured testified he was injured was a temporary structure erected by the employees and for which the Bridge Company was not responsible.

Middleton vs. P. Sanford Ross, 202 Fed. 799.

Armour vs. Hahn, 111 U. S. 313.

Haughey vs. Thatcher, 85 N. Y. S. 935.

Phoenix Bridge Co. vs. Castleberry, 131 Fed. 175.

Reynolds vs. Barnard, 168 Mass. 226.

Anderson Admr. vs. Smith, 226 U. S. 439.

The injured party and the men working about him were fellow-employees, and if some of his fellow-employees threw down these planks while doing this work and the injured passed over them, it would be the act of a fellow-servant.

Most vs. Kern, 34 Ore. 237.

Brunell vs. S. P. Co., 34 Ore. 256.

Seeds vs. American Bridge Co., 144 Fed. 605.

Baugh vs. Baltimore & Ohio Railroad Co., 149 U. S. 368.

The company in this case had provided a safe runway and staging for the men to walk upon and use in doing their work and if the men, including this injured man, prepared a place of their own, or provided a temporary walkway, the Bridge Com-

pany is not liable for negligence because of a defect in the temporary structure. In such a case the injured employee is guilty of contributory negligence and assumes the risk.

Dryden vs. Pelton-Armstrong Co., 53 Ore., page 418.

### ARGUMENT.

In the statement of facts we have dwelt somewhat on the evidence and have set forth the testimony of the injured party so far as was related to the platform where he claims he was injured. The injured party is the only witness who testified as to what this staging consisted of. All the other witnesses, among whom were Chalfan, Hofstetter, Clark and Holmes, testified that there was no such platform there. The superintendent, Dawson, also testified that they had a regular scaffolding gang and this gang had never constructed such a platform as the injured man complains of.

The defendant-in-error contends and claims that the deposition of Piltz and Carlgren was to the effect that the Bridge Company constructed this platform or staging. The physical facts, however, did not bear out any such conclusion. It is hardly conceivable that this foreman, Piltz, would take a gang of men and go over to this pier and build such a platform as described by the injured. The fact remains beyond question; if there was a platform there, as the injured contends, it was one prepared by the men themselves by simply throwing a few of the loose planks on the ground. The injured testified that there were several hundred planks laying around this coffer dam. A large number were piled up on the bank. All the witnesses testified that these planks that were scattered about the



coffer dam and the bank were taken from this pier. That is, were stripped off and, no doubt, many of them had nails in them. It would not be more than a minute's work for a man to throw four or five of these planks on the ground. From the coffer dam to the bank was only a few feet.

Some of the witnesses testified that there was water probably a foot deep at some points. Other witnesses testified that some of the excavated dirt had been thrown between the coffer dam and the bank and that while the dirt was soft, it was possible to walk on the dirt.

Whatever the facts remain to be, assuming that plaintiff's testimony is true, the most you can claim for this testimony is that the employees threw down a few of these planks which they had stripped from this pier and plaintiff walking over and across these planks received a puncture in the ball of his foot. If this had been a staging built by the Bridge Company or of a permanent character, or if it had been the only walkway that was there at the time, we would not argue this point, but all the testimony shows and points out that this company did have a float from the bank to the coffer dam which was constructed of solid planks, bolted to a log raft. The injured did not deny this and all the witnesses testified that this float could have been used and was used for the men to cross upon.

Referring briefly to the testimony of Hofstetter, pages 174 and 175 of the Transcript of Record, in which Hofstetter detailed the conversation had with the injured after the accident:

Q. Did Mr. Carlgren have any talk with him (meaning the injured)?

A. Yes, sir.

Q. What was the conversation?

A. He asked him what was the matter and he said he stepped on a nail.

Q. Was there any further conversation?

A. Not that I heard.

Q. Did he state anything about where the nail was?

A. He said it was in the board.

Q. Did he point to the board, or did he not?

A. No, not when I was there. He pointed off that way. Now, I don't know whether he meant to the board or what it was.

Q. Where were these boards that he pointed to?

A. They were all around on the shore there.

Q. On the bank where he was sitting?

A. There were boards scattered all over there.

Q. Hoy many boards were there?

A. Oh, I don't know. There must have been two or three thousand boards—a pile of them.

Q. They came clear from the top of the pier?

A. Yes, sir.

Q. How many boards were there?

A. Well, some of them would be probably—I think two-foot was the shortest piece they could use.

Q. Two feet long, some of them?

A. Yes, sir. That would be the shortest piece. Very seldom they used a piece two feet long; at times they did. And there were some fourteen or fifteen feet, I suppose. I don't know just how long.

Q. That was about the longest?

A. Yes, sir.

The other witnesses' testimony in regard to the boards that were lying about the place where the injured was hurt was practically the same. They



had been stripping these forms from the pier for several days. The injured was a man of some experience, as he testified that he had worked for the Bridge Company for several months before the accident; that he had followed building work and construction work for years, and, no doubt, knew that this lumber had nails in it. A glance would show him the condition of this lumber. The plaintiff-in-error's condition in this appeal is briefly that this plaintiff, being an experienced man with considerable knowledge of this kind of work, was injured by stepping on one of the loose boards that were thrown about this coffer dam. The fact that three or four of these boards were laid side by side for the injured or other employees to walk upon does not make the Bridge Company guilty of negligence. They were engaged at the time of the accident in demolishing this outer casing or form. They were cleaning up the debris which they themselves created. The foreman Chalfan was at the place of the accident, but even in doing this work of cleaning up, any act of the foreman would be the act of a fellow-servant. It was not a case where an employer had provided a platform or a staging or an appliance for the men.

As stated by the witness Hofstetter, on page 176 of the Transcript of Record: "There might have been a plank throwed in there, because there is quite often a plank throwed in there to walk on."

Q. Was there any built staging in there?

A. There was no built staging.

The testimony of Chalfan, Clark and Holmes and the City Engineer was to the same effect. No doubt, the men in getting around the coffer dam would occasionally pick up a plank and throw it on

the ground, but for this act the Bridge Company is not responsible.

In the case of *Seeds vs. American Bridge Co.*, 144 Federal 605, Judge Sanborn lays down the duties of an employer and the duties of an employee as follows:

“The risk that a safe place will become unsafe or that safe machinery will become dangerous by the negligence of the servants who use them, is one of the ordinary risks of the employment which the servants necessarily assume when they accept it. It is a risk of operation and not of construction or provision, and the duty to protect place and machinery from dangers arising from negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them.”

In this case the defendant-in-error was not so providing a place of permanent structure. There is no testimony in this case from which it can be assumed that the Bridge Company had anything to do with preparing this little platform over which the injured states he walked when injured. This injured party and his fellow-workmen were engaged in carrying out a detail of the work of demolishing this outer casing, tearing it up and removing the planks as they were stripped from the pier. In such work the rule of a safe place does not apply and cannot apply for the reason that the place is continually changing and the workmen themselves are making the place. In doing such work even under the instruction of a foreman, the workmen assume the risk of injury. In such a case there is no duty to provide safe machinery or appliances on the part of the employer.

As was said by Mr. Justice Brewer in the case

of Baltimore & Ohio Railroad Co. vs. Baugh, 149 U. S. 134:

“Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow-servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants. All enter into the service of the same master to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employees, and that risk, which he knows exists, he assumes in entering into the employment. \* \* \* He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid.”

But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employee, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as

though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible.

In Section 1545, 4 Labatt's Master and Servant, 2nd Edition, the following rule is annunciated:

"The general rule to which, for reasons to be explained in the following section, the courts have now committed themselves, may be stated thus: If the master supplies suitable material for the construction of an appliance which he is not obliged, and has not undertaken, to furnish in a completed state, and the workmen themselves construct it according to their own judgment, the master is not liable for the manner in which they used the materials thus supplied."

In this chapter and section this author discusses in detail the non-liability of the employer for acts of the servants in arranging temporary scaffolds, lays down the general rule that in temporary scaffolds there is no obligation or positive duty on the part of the employer to look for defects. So, in the case under consideration, the lumber from which this walkway was made was old lumber which had been scattered around this coffer dam. It had been stripped from the pier and the men themselves had laid it down to walk upon. For such an act the master is not responsible and should not be held liable.

In the case of Callan vs. Bull, 113 Cal. 593, the following rule is annunciated:

"The rule which required the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when



the machinery of other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done or the appliances for doing the same are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. The rule does not apply to a case where several persons are employed to do certain work, and, by the contract of employment, either expressed or implied, the employees are to adjust the appliances by which the work is to be done."

We submit that under the evidence in this case, the Court was in error in not directing the jury to find a verdict for the defendant, and respectfully submit that the case should be reversed.

Respectfully submitted,

F. S. SENN.





No. 2317

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,

vs.

LI CHIONG,  
Appellee.

In the Matter of the Application of LI CHIONG  
for a Writ of Habeas Corpus.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Territory of Hawaii.

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FILED  
OCT 30 1913



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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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June 13, 1913: Traverse to Return.

#### SERVICE OF PROCESS:

June 7, 1913: Writ issued and delivered to the United States Marshal for the District of Hawaii. Said writ afterwards returned into Court with the following return by the said United States Marshal, to wit: "Received the within Petition, Order and Writ of *Habeas Corpus* this 7th day of June, A. D. 1913, and returned as executed, [2] June 7, 1913, in Honolulu, by hand upon Richard L. Halsey, U. S. Immigration Inspector in Charge, by exhibiting to him the Original Petition, Order and Writ of *Habeas Corpus*, and handing to him a certified copy of same. Also upon Robert W. Breckons, U. S. District Attorney, this 7th day of June, A. D. 1913, by exhibiting to him the Original Petition, Order and Writ of *Habeas Corpus*, and handing to and leaving with him a certified copy of same."

#### HEARINGS:

June 25, 1913; Hearing on Demurrer to Return and Motion for Discharge of Petitioner.

The above hearing was had before the Honorable Sanford B. Dole, Judge of said Court.

#### DECISION:

July 5, 1913: Decision Allowing Motion for Discharge and ordering Petitioner Released from Custody.

#### JUDGMENT:

July 9, 1913: Judgment filed and entered.



PETITION FOR APPEAL:

August 15, 1913: Petition for Appeal filed and order allowing same signed. [3]

United States of America,  
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; the account of the proceedings showing the service of the writ herein; the time when judgment herein was rendered and the Judge rendering the same, in the matter of the Application of Li Chiong for a Writ of *Habeas Corpus*, Number 58, in the United States District Court for the District of Hawaii.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 3d day of September, A. D. 1913.

[Seal] A. E. MURPHY,  
Clerk United States District Court, Territory of  
Hawaii. [4]

*In the District Court of the United States, in and  
for the District and Territory of Hawaii.*

In the Matter of the Application of LI CHIONG  
for a Writ of Habeas Corpus.

**Petition for a Writ of Habeas Corpus.**

To the Honorable District Court of the United States  
in and for the District and Territory of Hawaii,  
and to the Honorable SANFORD B. DOLE,  
Judge of Said Court:

The undersigned, Li Chiong, the petitioner herein,  
respectfully represents and shows to this Honorable  
Court and to your Honor as follows:

I.

That your petitioner is a Chinese citizen and subject. That heretofore, to wit, on or about the 9th day of October, A. D. 1911, your petitioner, being a Chinese subject other than a laborer, to wit, a merchant, and residing in Manila, in the Philippine Islands, and desiring and being about to come to the United States of America, applied to His Imperial Chinese Majesty's Consul General in and for the Philippine Islands (he being the official designated by the United States and authorized to issue the certificates hereinafter referred to), to obtain the permission of and be identified by the Chinese Government as entitled to come to the United States, and after receiving such permission in the form of the certificate of identity required by the laws of the United States, and identified by the Chinese Government as entitled to come to the United States as

a person other than a laborer, to wit, a merchant, thereafter, and on or about the 12th day of October, A. D. 1911, applied to the proper representative [5] of the Government of the United States in said Manila, for visé of such certificate, and such certificate was viséed by such representative of the United States Government as provided by the laws of the United States. That your petitioner thereafter departed from said Manila intending to come to the United States, first visiting his birth-place in China, where the petitioner was married, and, after recovering from a sickness which he experienced there, left China, and arrived at the port of Honolulu, Hawaii, in the United States of America, on or about the 6th day of May, A. D. 1913, on the British steamship "Persia." A copy of said certificate of identity is hereto attached, marked Exhibit "A," and which petitioner prays may be made a part of this petition as fully to all intents and purposes as if fully set out herein in words and figures.

## II.

That upon arrival at the port of Honolulu, as aforesaid on or about the 6th day of May, A. D. 1913, your petitioner was taken in charge by the Immigration Officers of the United States, and afterward conveyed to the United States Immigration Station in said Honolulu, where he is unjustly and without warrant or authority of law imprisoned, and restrained and deprived of his liberty by Richard L. Halsey, United States Immigration Inspector in Charge at the port of Honolulu aforesaid, under the claim or pretense, as petitioner is informed and be-

lieves, and so upon such information and belief alleges, that the said petitioner is within one of the classes of persons excluded from admission to the United States, to wit, a Chinese laborer, and as such not entitled to land in the United States.

### III.

That on or about the 7th day of May, A. D. 1913, your petitioner presented to the United States Immigration Officers at the port [6] of Honolulu aforesaid the certificate of identity hereinbefore referred to, and was by them examined touching his right to land in the United States. That petitioner was not given such a fair and impartial hearing as is required by laws of the United States and by the Regulations of the Department of Labor, and the said Immigration Officers did not arrive at any conclusion nor make any decision based upon the certificate presented or other evidence of record in the case, and did not give to the certificate presented the weight to which it is by law entitled, and in fact did not give to such certificate any weight whatever, but rendered a decision denying this petitioner a landing in the United States directly contrary to the said certificate and to all the evidence of record in the case.

That said Richard L. Halsey, United States Immigration Inspector in Charge at the port of Honolulu as aforesaid, without any evidence that petitioner was within any of the classes of persons excluded from admission into the United States denied this petitioner a landing, and ordered him deported to the country whence he came. From which decision and



order of deportation your petitioner appealed to the Secretary of Labor at Washington, who arbitrarily and contrary to law and to the evidence, and without any evidence that the petitioner was within any of the classes of persons excluded from admission into the United States, affirmed said decision and order of deportation.

A copy of the record of such proceedings before the Immigration Officers of the United States at the port of Honolulu, aforesaid, is hereto attached, marked Exhibit "B," and which petitioner prays may be made a part of this petition as fully to all intents and purposes as if fully set out herein in words and figures:

Petitioner does not attach a copy of the proceedings on appeal as he does not have the same, and is informed and believes, and so upon such information and belief alleges, cannot obtain the same at this time. [7]

#### IV.

Your petitioner further alleges that such certificate of identity was not controverted or the facts therein stated disproved by the United States authorities as by law provided, but, on the contrary, the said United States Immigration Officers, and the said Richard L. Halsey, United States Immigration Inspector in Charge at the port of Honolulu, aforesaid, admitted such certificate to be genuine, and such as is required by the laws of the United States to be presented by a Chinese merchant seeking admission into the United States, and admitted further that the

petitioner was and is the lawful holder of such certificate.

V.

And your petitioner further shows that he is held in custody, detained, imprisoned and deprived of his liberty by said Richard L. Halsey in violation of the Constitution of the United States, to wit, Article 14, Constitutional Amendments, and contrary to the acts of Congress of the United States in such case made and provided, and contrary to the Treaty entered into between China and the United States of America, and is unlawfully deprived of his right to enter the United States, as petitioner is informed and believes and upon such information and belief alleges and avers, under and by virtue of the claim as aforesaid, and threatens to deport your petitioner to China by the earliest opportunity; and your petitioner further shows that said holding in custody, detention, imprisonment and threat to deport are illegal for the reasons hereinabove set forth:

WHEREFORE, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said Richard L. Halsey, United States Immigration Inspector in Charge, as aforesaid, may issue in this behalf, [8] so that your petitioner may be forthwith brought before this Honorable Court, to do, submit to and receive what the law may direct.

(Sgd.) LI CHIONG,  
Said Petitioner.

Dated, Honolulu, Hawaii, June 5, 1913.

(Sgd.) GEO. S. CURRY,  
Attorney for Petitioner.



United States of America,  
Territory of Hawaii,  
City and County of Honolulu,—ss.

And now comes Li Chiong, who being first duly sworn, upon his oath, according to law, deposes and says, that he is the petitioner named in the above foregoing petition subscribed by him; that he has heard the same read over to him and knows the contents thereof; and that the matters and things therein set forth and contained are just, true and correct, except as to those matters and things therein alleged on information and belief, and as to them he verily believes them to be true.

(Sgd.) LI CHIONG,  
Petitioner.

Subscribed and sworn to before me by said Li Chiong, this 5th day of June, A. D. 1913.

[Seal] (Sgd.) J. S. WALKER,  
Notary Public First Judicial Circuit, Territory of Hawaii. [9]

**Exhibit "A" [to Petition for Writ of Habeas  
Corpus—Certificate of Identity].**

ORIGINAL.

No. IX.

This certificate is issued to LI CHIONG, a Chinese subject other than a laborer, as evidence of the permission of the Chinese Government for him to go to the United States, as a means of establishing his identity, and as evidence of his right to enter and reside in the United States:

Signature of the bearer—LI CHIONG.

Full name individual—CHIONG; family—LI.

Age—22 years; height, five feet 3-1.2 inches.

Physical peculiarities—Two small moles, and pock marked in front center left ear; linear scar left middle finger; dim mole left upper lip.

Former occupation or profession—STUDENT.

When pursued—1903—1904.

Where pursued—MANILA, P. I.

How long pursued—one year.

Present occupation or profession—MERCHANT.

When pursued—Since 1904.

Where pursued—Manila, P. I.

How long pursued—7 years.

Last place of residence—#110 San Fernando Manila, P. I.

If a merchant, the following additional blanks should be filled out:

Nature of business—Grocery.

Character of business—“

Estimated value of business—peso. 20,000.00.

Style and address of firm—Kwong On Tai, 110 San Fernando, Manilo.

(If a traveller the following additional blanks should be filled out: The applicant intends to pass through travel within the United States.

Financial standing.....)

Given under my hand and official seal this 9th day of October, 1911.

[Seal]

(Signed) SUN SZE YEE,

H. I. C. M.,

Consul-General in and for the Philippine Islands.

I do hereby certify that I have examined into the truth of the statements set forth in the foregoing certificate, and found upon examination that the same are true, and that the signature and seal to the foregoing certificate are the genuine signature and seal of Sun Sze Yee, Chinese Consul-Gen.

Witness my hand and official seal this 12th day of October, 1911.

(Signed) H. B. McCOY,  
Insular Collector of Customs.

[Seal of Collector of Customs.]

[Stamps and Picture of person to whom issued attached. ] [10]

**Exhibit "B" [to Petition for Writ of Habeas Corpus—Record of Proceedings Had Before Immigration Bureau, at Honolulu.]**

COPY.

Honolulu, T. H.

Case of LI CHIONG (LEE CHONG), ex. S/S.  
"Persia," 5/6/13.

HARRY B. BROWN, Inspector.

TONG KAU, Interpreter.

Applicant presents Section Six certificate No. 9, issued by the Chinese Consul General at Manila and viséed by the Insular Collector of Customs.

Picture attached under seal, dated Oct. 12, 1911.

Applicant sworn, testifies.

Q. What are your names?

A. Li Chiong, Li Yick Foon.

Q. How old are you?      A. 24.

Q. What is your occupation?     A. Merchant.

Q. Where have you been a merchant?

A. Manila.

Q. How long were you a merchant there?

A. Since 1904.

Q. How did you first get an interest in a store there?     A. My father gave it to me.

Q. How you still an interest in a store in Manila?

A. Yes.

Q. Do you expect to return to Manila?

A. Maybe.

Q. What is the name of the store?

A. Kwong On Tai.

Q. What kind of goods do they carry?

A. Groceries.

Q. Did you work in that store?     A. Yes.

Q. Did you have any other occupation?     A. No.

Q. What is the value of your interest in this store at the present time?     A. 4,000 pesos.

Q. What do you expect to do in Hawaii?

A. Business.

Q. What store?

A. I don't know yet; I will have to look around.

Q. How much money have you with you?

A. Draft for \$1250 gold.

Q. How long do you expect to remain in Hawaii?

A. I don't know.

Q. When did you leave Manila?     A. 1911.

Q. Where have you been living at that time?

A. In my village in China.

Q. What have you been doing in the village?

A. Nothing.

Q. Are you married?     A. Yes.

Q. What is the name of your wife?

A. Wong Shee, aged 20, natural feet.

Q. When were you married?     A. 1911.

Q. What month?     A. 12th Chinese month.

Q. What is the name of your village in China?

A. Ching Foo.

Q. Have you children?

A. None at present, but one is expected soon.

Q. Where was your wife born?     A. China.

Q. Have you been in the United States before?

A. No.

Q. Are your parents living?     A. Yes.

Q. What are their names?

A. Li Hon, and mother is Ng She.

Q. Where is your father?     A. Hong Kong.

Q. What is his occupation?     A. Merchant.

Q. What store?     A. Kwong Sing Tai.

Q. If you intended to come to the United States when you left Manila, why have you waited so long?

A. I was married and last September I was taken sick.

Q. Why did you not get your section 6 certificate renewed or changed?

A. When I received this paper and went to China I intended to come here in a few months. [11]

Q. Is there any further statement you wish to make?

A. When I came this time the steamer passed Manila, and I went ashore and saw my store.

(Sgd.) LI CHIONG.



Subscribed and sworn to before me this 7th day of May, 1913.

(S) HARRY B. BROWN,  
Immig't and Actg. Chinese Insp.

"The foregoing testimony has been translated to the affiant by me and before signing he has acknowledged that it is a correct record, and that he fully understood the same.

(S) TONG KAU,  
Interpreter."

"EXHIBIT" B"—Sheet #2,  
Honolulu, T. H., May 7, 1913.  
Case of LI CHIONG

#### FINDING.

That Section Six certificate presented by this applicant was issued October 9, 1911, and signed by the Insular Collector of Customs at Manila, October 12th, 1911, that is, about one year and seven months ago, and from the testimony of the applicant he has been living in his village in China since that time but made a brief visit at his place of business in Manila while the steamer was in that port on its present voyage to the United States. As it has been a year and seven months since this applicant followed a mercantile pursuit, and as we have nothing *expect* his word that he has been doing since that time.

As there has been sufficient time for this applicant to have lost his mercantile status, I am of the opinion that he should be denied a landing and re-



turned to the country whence he came.

(Signed) HARRY B. BROWN,  
Imm't and Act'g Chinese Insp.

Approved.

(Signed) RICHARD L. HALSEY,  
Inspector in Charge.

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*District and Territory of Hawaii.*

In the Matter of the Petition of LI CHIONG, for a  
Writ of Habeas Corpus.

**Order [Directing Issuance of Writ of Habeas  
Corpus, etc.].**

Upon motion of Geo. S. Curry, counsel for the petitioner [12] above named, and upon having read the within petition for a writ of *habeas corpus*, and upon the showing made, it appears to me that a writ of *habeas corpus* should issue, as prayed for in the within petition, and I do hereby order and direct that a writ of *habeas corpus* be forthwith issued out of this Court directing and commanding Richard L. Halsey, United States Immigration Inspector in Charge, at the port of Honolulu, Hawaii, to have and produce the body of the within named petitioner before this Court on Tuesday, the 10th day of June, A. D. 1913, at the hour of 10 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard.

And I do hereby further order and direct that a copy of this petition and writ be forthwith served upon Robert W. Breckons, United States District

Attorney for the District and Territory of Hawaii,  
or his deputy.

(Sgd.) S. B. DOLE,

Judge of the District Court of the United States in  
and for the District and Territory of Hawaii.

Dated, Honolulu, Hawaii, June 7th, 1913.

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**[Writ of Habeas Corpus and Marshal's Return  
Thereeto.]**

The President of the United States of America, to  
RICHARD L. HALSEY, Esquire, United  
States Immigration Inspector in Charge, at the  
Port of Honolulu, Territory of Hawaii.

We command you that the body of Li Chiong by  
you detained and imprisoned, as is charged, you have  
before our District Court of the United States in  
and for the District and Territory of Hawaii on  
Tuesday, the 10th day of June, A. D. 1913, at the hour  
of ten o'clock in the forenoon of said day, together  
with the cause of the detention of the said Li Chiong,  
to then and there undergo and receive what our said  
Court shall consider concerning him in [13] this  
behalf, and have you then and there this writ with  
your doings thereon, and you, Eugene R. Hendry,  
United States Marshal in and for the District and  
Territory of Hawaii, are hereby directed and com-  
manded to forthwith serve this writ.

Witness the Honorable SANFORD B. DOLE, and  
CHARLES F. CLEMONS, Judges of the District  
Court of the United States in and for the District and

Territory of Hawaii, this 7th day of June, A. D. 1913.

[Seal]

A. E. MURPHY,  
Clerk of the District Court of the United States, in  
and for the District and Territory of Hawaii.

By (Sgd.) F. L. DAVIS,  
Deputy.

U. S. Marshal's Office.

MARSHAL'S RETURN.

Received the within Petition, Order and Writ of *Habeas Corpus* this 7th day of June, A. D. 1913, and returned as executed June 7, 1913, in Honolulu, by hand upon Richard L. Halsey, U. S. Immigration Inspector in Charge, by exhibiting to him the original Petition, Order and Writ of *Habeas Corpus*, and handing to him a certified copy of same.

Dated Honolulu, T. H., June 9, 1913.

(Sgd.) E. R. HENDRY,  
United States Marshal.

Also upon ROBT. W. BERCKONS, U. S. District Attorney, this 7th day of June, A. D. 1913, by exhibiting to him the Original Petition, Order and Writ of *Habeas Corpus*, and handing to and leaving with him a certified copy of same.

(Sgd.) E. R. HENDRY,  
United States Marshal.

[Endorsed]: No. 58. Petition, Order and Writ. Filed June 7, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [14]

*In the United States District Court in and for the  
Territory of Hawaii.*

In the Matter of the Application of LI CHIONG  
for a Writ of Habeas Corpus.

**Return of Richard L. Halsey,**  
UNITED STATES IMMIGRATION INSPECTOR  
IN CHARGE AT THE PORT OF HONO-  
LULU, TERRITORY OF HAWAII, TO THE  
WRIT OF HABEAS CORPUS HERETO-  
FORE, ON THE 7TH DAY OF JUNE, A. D.  
1913, ISSUED BY THE HONORABLE SAN-  
FORD B. DOLE, ONE OF THE JUDGES OF  
THE ABOVE-ENTITLED COURT.

And by way of return to the said order and writ herein issued, your respondent demurs to said petition, and for grounds of demurrer says:

First. That said petition does not state facts sufficient to entitle the petitioner to the relief in his said petition prayed for.

Second. That the said petition and the alleged facts therein stated show affirmatively that the said petitioner did not have the certificate required by the laws and treaties of the United States permitting him to land within the United States.

Third. That the said petitioner did not present to the proper authorities of the United States a certificate issued by the Chinese Government and viséed by the endorsement of the diplomatic representative of the United States in China.

Fourth. That the said petitioner did not present a certificate as a merchant viséed by the consular

representative of the United States at the port or place from which the person named in [15] the certificate departed.

Fifth. That from the petition itself it appears that it has been duly and regularly determined by the proper immigration officials of the United States of America, that the said petitioner did not present to the proper immigration officials such a certificate as is required by the laws and treaties of the United States.

Sixth. That from the petition itself it appears that it has been duly and regularly determined by the proper immigration officials of the United States of America that the said petitioner had abandoned his intention to come to the United States subsequent to the issuance of the certificate attached to said petition.

Seventh. That from the petition itself, it appears that it has been duly and regularly determined by the proper immigration officials of the United States of America, that the said petitioner, subsequent to the issuance of said certificate, had abandoned his status as a merchant.

Eighth. That it appears from the facts set forth in said petition that the said petitioner subsequent to the issuance of the certificate attached thereto had abandoned his intention of coming to the United States.

Ninth. That this Court has no jurisdiction whatsoever in the premises.

And by way of further return, the said Richard L. Halsey alleges as follows, to wit:



First. The respondent says that petitioner being a person of Chinese descent, arrived at the port of Honolulu on or about the 6th day of May, A. D. 1913, and presented to the proper official of the United States the certificate attached to the petition in this case; that thereupon the said petitioner was duly regularly accorded a hearing as to his right to land, the said hearing having [16] been given him by Harry B. Brown, an Inspector of Chinese at the port of Honolulu; that the said hearing was fair and full in every respect; a copy of it being as set forth in the petition herein; that upon the conclusion of said hearing, the said Harry B. Brown made a finding that the said petitioner had lost any mercantile status which he may have had at the time when said certificate was issued; that thereupon the finding of the said Harry B. Brown was approved by the said Richard L. Halsey, and it was held and determined by the said Richard L. Halsey that the said petitioner had lost his mercantile status, and further, that any intention which the said petitioner might have had when departing from Manila to come to the United States had been abandoned upon his arrival at China, and further, that when the said petitioner had departed from Manila his intention was to go to China and not to the United States; that thereupon the said petitioner was by the said Richard L. Halsey denied a landing in the United States of America and ordered deported to the country whence he came; that thereupon the said petitioner appealed from the said decision of the said Richard L. Halsey to the Secretary of Labor at Washington, and that



upon said appeal the said decision was affirmed and the said appeal dismissed.

Second. That in the determination of said case, the said Richard L. Halsey did take into consideration the said certificate so presented, together with all the other evidence in the case, and did give to said certificate the weight to which he believed the same was entitled, and did determine the validity, force, weight and effect of all the evidence presented.

Third. That the allegation set forth in paragraph 1 of said petition, that the petitioner when departing from Manila intended to come to the United States is denied. That the allegation that the petitioner stopped in China for a visit is denied. That the allegation that petitioner was not given such a fair and impartial hearing as is required by the laws of the United States and by the regulation of the [17] Department of Labor is denied.

Fourth. That amongst other things held and determined by the said Richard L. Halsey, was that the petitioner was not within one of the classes of Chinese persons permitted to enter the United States.

Fifth. That each and every allegation in the petition for the writ of *habeas corpus* herein not herein expressly admitted is denied by respondent.

(Sgd.) RICHARD L. HALSEY,

Inspector in Charge.

(Sgd.) C. C. BITTING,

United States Attorney, for Respondent.

United States of America,

Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn accord-

ing to law, deposes and says that he is the Richard L. Halsey who has made the return to the writ of *habeas corpus* in the above-entitled cause; that he has read the said return, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 13th day of June, A. D. 1913.

[Seal] (Sgd.) WM. L. ROSA,  
Deputy Clerk, United States District Court, Territory of Hawaii.

[Endorsed]: No. 58. (Title of Court and Cause.)  
Return of Richard L. Halsey. Filed Jun. 13, 1913.  
A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa,  
Deputy. [18]

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*In the District Court of the United States in and for  
the District and Territory of Hawaii.*

In the Matter of the Petition of LI CHIONG for a  
Writ of Habeas Corpus.

**Exceptions to Demurrer-Return and Motion to  
Discharge.**

And now comes the petitioner in the above-entitled cause, by his attorney, Geo. S. Curry, and excepts to the demurrer-return filed by the respondent Richard L. Halsey, United States Immigration Inspector in Charge, and moves that it be overruled, and stricken from the files of this Court, and that the petitioner be discharged from the custody of said respondent on the grounds:

1. That the sufficiency of the petition herein was

argued before this Honorable Court, and the petition held sufficient and the writ of *habeas corpus* issued herein, and the only question attempted to be raised by such demurrer-return (paragraphs numbered 1 to 9, both inclusive) was passed upon and decided by this Honorable Court prior to the issuing of the writ of *habeas corpus* herein.

2. That it is not a proper pleading to question the sufficiency of the petition.

3. That it is not properly a demurrer since it attempts to admit some facts, to deny other, and alleges new matter.

4. That the said demurrer-return (paragraphs numbered 1 to 9, both inclusive) constitute a refusal on the part of the respondent herein to make return, in obedience to the writ of *habeas corpus*, of the cause of the detention of the petitioner. [19]

5. That the writ having issued, the only method by which the sufficiency of the petition can be attacked is by a motion to quash the writ.

WHEREFORE your petitioner prays that his exceptions to the said demurrer-return of the respondent herein be sustained, and the said demurrer-return be overruled and quashed, and that this petitioner be ordered discharged from the custody of the said respondent.

LI CHIONG,  
Said Petitioner,

By His Attorney,

(Sgd.) GEO. S. CURRY.

Honolulu, Hawaii, June 12, 1913.

[Endorsed]: No. 58. (Title of Court and Cause.)  
Exceptions to Demurrer-Return and Motion to Dis-  
charge Petitioner. June 13, 1913.

Filed Jun. 13, 1913. A. E. Murphy, Clerk. By  
(Sgd.) F. L. Davis, Deputy Clerk. [20]

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*In the District Court of the United States in and for  
the District and Territory of Hawaii.*

In the Matter of the Petition of LI CHIONG for a  
Writ of Habeas Corpus.

**Motion [for Amendment of Petition].**

And now comes the petitioner above named, and  
moves this Honorable Court that the petitioner's peti-  
tion filed herein be amended by adding thereto the  
following paragraph, to be known as paragraph  
"III-A," in the words and figures following, to wit:

"Your petitioner further alleges and says that the  
said examination and hearing of the 7th day of May,  
A. D. 1913, was not a full and fair hearing, but was  
only the semblance of a hearing, and this petitioner  
was denied and refused the right to have counsel and  
interpreter present during such examination and  
hearing in violation of his rights, and contrary to  
law, and contrary to the express instructions of the  
Department of Labor."

LI CHIONG.

By His Attorney,

(Sgd.) GEO. S. CURRY.

Honolulu, Hawaii, June 12, 1913. [21]

*In the District Court of the United States in and for  
the District and Territory of Hawaii.*

In the Matter of the Petition of LI CHIONG for a  
Writ of Habeas Corpus.

“III-A.”

“Your petitioner further alleges and says that the said examination and hearing of the 7th day of May, A. D. 1913, was not a full and fair hearing, but was only the semblance of a hearing, and this petitioner was denied and refused the right to have counsel and interpreter present during such examination and hearing in violation of his rights, and contrary to law, and contrary to the express instructions of the Department of Labor.”

(Sgd.) LI CHIONG.

United States of America,  
Territory of Hawaii,  
City and County of Honolulu,—ss.

And now comes Li Chiong, who being first duly sworn upon his oath, according to law, deposes and says, that he is the petitioner named in the above-entitled cause; that he has heard read over to him the above and foregoing paragraph “III-A” and knows the contents thereof, and that the matter and things therein set forth and contained are just, true and correct.

(Sgd.) LI CHIONG.

Subscribed and sworn to before me this 13th day of June, A. D. 1913.

[Seal]

(Sgd.) J. S. WALKER,

Notary Public, 1st Judicial Circuit, Territory of  
Hawaii. [22]



[Endorsed]: No. 58. (Title of Court and Cause.)  
Motion to Amend Petition. June 13, 1913.

Filed Jun. 13, 1913. A. E. Murphy, Clerk. By  
(Sgd.) F. L. Davis, Deputy Clerk. [23]

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*In the District Court of the United States in and for  
the District and Territory of Hawaii.*

In the Matter of the Petition of LI CHIONG for a  
Writ of Habeas Corpus.

**Traverse to Return.**

Traverse to the return of Richard L. Halsey, United States Immigration Inspector in Charge, at the port of Honolulu, Hawaii, to the writ of *habeas corpus* issued herein, before the Honorable District Court of the United States, in and for the District and Territory of Hawaii:

Comes now the said petitioner, Li Chiong, and for and in answer to the return of Richard L. Halsey, United States Immigration Inspector in Charge, at the port of Honolulu, District and Territory of Hawaii, to the writ of *habeas corpus* to him directed, in this matter, alleges and says as follows, to wit:

To the first paragraph of said return, that the petition does state facts sufficient to entitle this petitioner to the relief prayed, and it was so decided by your Honor and this Honorable Court;

To the second paragraph of said return, that he denies the allegations and averments thereof, and alleges and avers that he did have the certificate required by the laws and treaties of the United States, entitling him to land within the United States;



To the third and four paragraphs of said return, that he denies the allegations and averments thereof, and alleges and avers that he did present the certificate required by law; [24]

To the fifth paragraph of said return, that he denies the allegations and averments thereof, and alleges and says that he is informed and believes, and so upon information and belief alleges and says that the presentation of a proper certificate was, by the attorney for the respondent herein, admitted in open court;

To the sixth paragraph of said return, that he denies the allegations and averments thereof, and alleges and says that the proper Immigration Officials of the United States did not decide or determine that this petitioner had abandoned his intention to come to the United States subsequent to the issuance of the certificate attached to the petition herein, and further alleges and says that there is and was no evidence before the said Immigration Officials from which such a conclusion could be drawn;

To the seventh paragraph of said return that he denies the allegations and averments thereof, and alleges and says that the Immigration Officials of the United States did not decide that the petitioner had abandoned his status as a merchant, and further alleges and says that there is and was no evidence before the said officials from which such a conclusion could be drawn;

To the eighth paragraph of said return that he denies each and every, all and singular, the allegations and averments thereof;

To the ninth paragraph of said return, that it is a conclusion of law, and is solely for this Court to determine, and that this Court has determined that it has jurisdiction in the premises.

And the said petitioner, Li Chiong, for and in answer to the further return of the said respondent, alleges and says as follows, to wit: [25]

To the first paragraph of said further return of the said respondent herein, petitioner admits that he is a person of Chinese descent, and that he arrived at the port of Honolulu, in the Territory of Hawaii, and United States of America, on or about the 6th day of May, A. D. 1913, and presented to the proper official of the United States the certificate, a copy of which is attached to the petition herein; that this petitioner was accorded a hearing, but denies that the hearing was a full and fair hearing, and alleges and says that it was only the semblance of a hearing, and petitioner was denied the right to have counsel and interpreter present at his examination as required by law, and as by law he is entitled to; that he denies that upon the conclusion of the said hearing Inspector Harry B. Brown, or any other United States Official, held and determined that your petitioner had lost his mercantile status; that he admits that from the excluding decision rendered by the United States Immigration Officials at the port of Honolulu aforesaid, he appealed to the Secretary of Labor, at Washington, and said appeal was dismissed.

To the second paragraph of the said further return, that he denies each and every and all and singular the allegations and averments thereof, and

alleges and says that the said case was decided contrary to law contrary to all the evidence adduced, including the certificate hereinbefore referred to, and further alleges and says that there was no evidence before the United States officials to controvert the said certificate, or which in any way tended to controvert the same, and that there was no evidence before such officials to disprove the facts stated in such certificate, or which in any way tended to disprove any of the facts stated in such certificate.

To the third paragraph of said further return, that he denies each and every, all and singular the allegations and averments thereof, and alleges and says that when this petitioner left Manila, and at all times thereafter, this petitioner did intend to come to the [26] United States, and denies that he ever abandoned his intention to come to the United States;

To the fourth paragraph of said further return, petitioner denies each and every, all and singular the allegations and averments thereof, and alleges and says that there was no evidence before the United States officials to show, or which in any wise tended to show that this petitioner was within any of the classes of persons excluded from admission to the United States, and alleges that there was no evidence which in any wise tended to show that he was not within the classes of persons entitled to enter the United States.

And further answering said return and further return of the respondent herein, this petitioner alleges and says that he admits that Exhibit "A" attached to the petition herein is a true copy (except for

photograph) of the certificate hereinbefore referred to, and that the record of proceedings attached to said petition Exhibit "B" is a full, just, true and correct copy of the proceedings before the United States Immigration officials at said Honolulu.

And your petitioner further alleges and says that the certificate presented as aforesaid complied in all respects with the laws of the United States, and the regulations of the Department of Commerce and Labor, and the Department of Labor promulgated under the laws of the United States, and that the same was not controverted in any manner or the facts therein stated disproved by the United States officials or otherwise, but, on the contrary, the proceedings in this case disclose that all the evidence verified, confirmed and substantiated said certificate, and petitioner hereby calls upon the respondent herein to bring into and present to this Honorable Court the said certificate so presented as aforesaid; [27]

And petitioner further alleges and shows that he is and always has been a member of the class of persons expressly entitled to come to and reside within the United States; that he is now and has been for many years last past a merchant expressly entitled by the laws of the United States and the treaty with China to come into and reside within the United States.

And your petitioner further alleges and shows that there was and is no evidence before the United States officials, or otherwise, to show that the petitioner is within any of the classes—or persons excluded by



law from admission to the United States, and further alleges that he is not within any of the classes of persons excluded from admission to the United States, but is within the class of persons expressly entitled by the laws and treaties of the United States to come into and reside within the United States; and that he did not have a full and fair hearing as he is by law entitled to before the United States Immigration officials, but was denied the right to have counsel and interpreter present during his examination and that your petitioner was denied admission to the United States by the said respondent without a fair hearing, and contrary to the evidence, and contrary to law, and without evidence or warrant or authority of law to justify such denial, and is now held in custody, restrained of his liberty, detained and imprisoned by the said respondent without warrant or authority in law, and contrary to the constitution and laws of the United States and to the treaty between the United States and China.

And your petitioner further alleges and says that he was examined under the immigration laws of the United States, and was by the United States Immigration officers found, determined and decided and declared to be admissible under such laws, and was by them passed under such laws, as an alien entitled under such laws to admission to the United States.

[28]

This petitioner therefore alleges that the said hearing so-called and the conclusions arrived at and the order made therein are absolutely null and void as being in excess of the rights and jurisdiction of said

respondent. And petitioner prays that the said return and further return of said respondent may be adjudged to be not a proper return, and the reasons given therein are not valid and lawful, and are not sufficient in law to authorize the holding of such petitioner in such detention or the deporting of him, and that the petitioner be discharged from such custody.

(Sgd.) LI CHIONG,  
Said Petitioner.

Honolulu, Hawaii, June 13, 1913.

United States of America,  
Territory of Hawaii,  
City and County of Honolulu,—ss.

And now comes Li Chiong, the petitioner herein, and having heard read to him the above and foregoing traverse to the return in this proceeding, and the same having been translated from the English into the Chinese language and fully explained to him, upon his oath, deposes and says that the facts and statements set forth and contained therein are just, true and correct.

(Sgd.) LI CHIONG,  
Said Petitioner.

Subscribed and sworn to before me by the said Li Chiong this 13th day of June, A. D. 1913.

[Seal] (Sgd.) J. S. WALKER,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

(Sgd.) GEO. S. CURRY,  
Attorney for Petitioner.



[Endorsed]: No. 58. (Title of Court and Cause.)  
Traverse of Petitioner to the Return of Respondent.  
Filed Jun. 13, 1913. A. E. Murphy, Clerk. By  
(Sgd.) F. L. Davis, Deputy Clerk. [29]

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**[Order Continuing Hearing of Motion for Discharge  
to June 25, 1913.]**

From the Minutes of the United States District  
Court, Vol. 8, Page 563, Tuesday, June, 24, 1913.

[Title of Court and Cause.]

On this day came Mr. George S. Curry, counsel  
for the above petitioner, and also came Mr. C. C.  
Bitting, Assistant United States District Attorney,  
on behalf of the respondent herein, and this cause  
was called for hearing. Thereupon it was by the  
Court ordered that this cause be continued to June  
25, 1913, at 10 o'clock, for hearing on motion for dis-  
charge. [30]

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**[Order of Submission of Motion for Discharge.]**

From the Minutes of the United States District  
Court, Vol. 8, Page 565, Wednesday, June 25,  
1913.

[Title of Court and Cause.]

On this day came the above petitioner in person  
and with his counsel, Mr. George S. Curry, and also  
came Mr. C. C. Bitting, Assistant United States Dis-  
trict Attorney, on behalf of the respondent herein,  
and this cause was called for hearing on Motion for  
Discharge. Thereupon due argument having been

had by respective counsel, the said motion was by the Court taken under advisement. [31]

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**[Order Requiring Petitioner to Furnish a Recognizance Pending Appeal, etc.]**

From the Minutes of the United States District Court, Vol. 8, Page 572, Saturday, July 5, 1913.

[Title of Court and Cause.]

On this day came Mr. George S. Curry, counsel for the above petitioner, and also came Mr. C. C. Bitting, Assistant United States District Attorney, on behalf of the respondent herein, and this cause was called for hearing on Motion for Discharge. Thereupon the Court read and filed its Decision herein, allowing said motion, whereupon Mr. Bitting having given notice of appeal herein, it was by the Court ordered that the said petitioner furnish a recognizance herein in the sum of \$250.00 pending such appeal. [32]

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**[Decision.]**

*In the United States District Court for the Territory of Hawaii.*

APRIL A. D. 1913 TERM.

No. 58.

In the Matter of the Application of LI CHIONG,  
for a Writ of Habeas Corpus.

July 5, 1913.

Upon this application for a writ of *habeas corpus*, the immigration inspector in charge gave as a rea-

son for refusing admittance to the petitioner, that from the petition itself it appears that it was decided by such immigration inspector that the petitioner did not present a certificate issued by the Chinese Government viséed by the diplomatic representative of the United States in China; also that the petitioner did not present a certificate as a merchant viséed by the consular representative of the United States at the port or place from which the person named in the certificate departed; also that the petitioner did not present to the proper immigration officials such a certificate as is required by the laws and treaties of the United States; also that it appears from the petition itself that the petitioner had abandoned his intention of coming to the United States subsequent to the issuance of the certificate; also that it appears [33] from the petition itself that it had been determined by such immigration inspector in charge that the petitioner, subsequent to the issuance of such certificate, had abandoned his status as a merchant.

It appears by the copy of the certificate submitted with the petition that it was issued by His Imperial Chinese Majesty's Consul General in and for the Philippine Islands and that it was viséed by H. B. McCoy, Insular Collector of Customs at Manila.

Rule 11c of the Regulations governing the admission of Chinese provides as follows:

“The governor of the Philippine Islands having, by executive order No. 38, of September 23, 1904, designated the collector of customs, Manila, to issue to Chinese citizens of those islands the certificate

provided by section 6 of the act of July 5, 1884, and it being practicable to require that such certificates shall be viséed, officers at ports of entry for Chinese will regard certificates issued to such Philippine citizens in the same manner as certificates issued by officials of foreign countries and viséed by American diplomatic or consular officers. Certificates issued by the Chinese Consul-General, Manila, to subjects of the Chinese Empire residing in the Philippines will be viséed by the collector of customs at Manila, and when so viséed will be accorded the usual consideration."

From this it appears that the rule has been exactly followed in regard to the issue and visé of the certificate in question. [34]

As to the other points, that the petitioner had abandoned his intention to come to the United States subsequent to the issuance of the certificate, there is no rule or statute that I am aware of which limits the life of such certificate or provides that if not used within a certain time it shall become invalid. And as to the point that the petitioner, subsequent to the issuance of such certificate abandoned his status as a merchant, I find in section 6 of the act of 1882, as amended by the act of 1884, that "such certificate viséed as aforesaid shall be *prima facie* evidence of the facts set forth therein and shall be produced to the Chinese inspector in charge at the port of the district of the United States at which the person named therein shall arrive \* \* \* and shall be the sole evidence permissible on the part of the person so producing the same to establish the right



of entry into the United States; and said certificate may be controverted and the facts therein stated disproved by the United States authorities."

From this we find that all that the petitioner had to do was to produce his certificate. In fact, he should not have been permitted to do anything more than to exhibit his certificate, leaving it to the Government to controvert and disprove the same. This has not been done, except as the Government may have considered the petitioner's testimony to have controverted and disproved the certificate and the facts therein stated, which cannot be said to have happened. The inspector in charge has, in the view of this Court, mistaken the law of the case.

The petitioner is therefore discharged from the custody of the respondent.

(Sgd.) SANFORD B. DOLE. [35]

[Endorsed]: No. 58. (Title of Court and Cause.)  
Decision. Filed Jul. 5, 1913. A. E. Murphy, Clerk.  
By (Sgd.) F. L. Davis, Deputy Clerk. [36]

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*In the District Court of the United States in and for  
the District and Territory of Hawaii.*

In the Matter of the Petition of LI CHIONG, for a  
Writ of Habeas Corpus.

### **Judgment.**

At the regular April, A. D. 1913, term of the District Court of the United States in and for the District and Territory of Hawaii, held in the courtroom of said Court in Honolulu, City and County of Honolulu, in the Territory of Hawaii and District of

Hawaii, on Saturday, the 5th day of July, A. D. 1913, the above-entitled cause, having heretofore been heard on the pleadings and arguments by counsel for the respective parties and due deliberation had thereon, the Court finds that the above-named petitioner, Li Chiong, is entitled to be discharged herein, subject to the taking of an appeal, in which case he may be released upon giving recognizance with sureties in the sum of TWO HUNDRED AND FIFTY DOLLARS (\$250.00) to answer the judgment of the Appellate Court.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above named petitioner Li Chiong be and he is hereby discharged from custody herein, subject to the taking of an appeal, and subject to exceptions by the United States of America.

And the Court being advised that the above-entitled cause will be removed to the Appellate Court by proper proceedings to be had in that behalf,

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the above named petitioner, Li Chiong, give his recognizance with surety in the sum and amount of TWO HUNDRED AND FIFTY DOLLARS (\$250.00), to answer the judgment of the Appellate Court, and that upon the giving of such recognizance the said petitioner, Li Chiong, be released from custody. [37]

Given, made and dated, at Honolulu, City and County of Honolulu, Territory and District of Hawaii, this 5th day of July, A. D. 1913.

(Sgd.) S. B. DOLE,

Judge of said Court.



[Endorsed]: No. 58. (Title of Court and Cause.)  
Judgment Entered in J. D. Book 2, at folio 428.  
Filed Jul. 9, 1913. A. E. Murphy, Clerk. By (Sgd.)  
Wm. L. Rosa, Deputy Clerk. [38]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of LI CHIONG for  
a Writ of Habeas Corpus.

**Petition for Appeal.**

To the Honorable SANFORD B. DOLE, Judge of  
the Above-entitled Court:

THE UNITED STATES OF AMERICA, by its  
attorney C. C. BITTING, conceiving itself aggrieved  
by the order and judgment made and entered on the  
9th day of July, A. D. 1913, in the above-entitled  
proceeding, does hereby appeal from the said order  
and judgment to the Circuit Court of Appeals for the  
Ninth Circuit, and files herewith its assignment of  
errors intended to be urged upon appeal, and it  
prays that its appeal may be allowed, and that a  
transcript of the record of all proceedings and papers  
upon which said order and judgment was made, duly  
authenticated, may be sent to the Circuit Court of  
Appeals for the Ninth Circuit of the United States.

Dated this 15th day of August A. D. 1913.

(Sgd.) C. C. BITTING,  
Assistant U. S. Attorney.

Received a copy of the above petition.

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By his Attorney,

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[Endorsed]: No. 58. (Title of Court and Cause.)  
Petition for Appeal. Filed Aug. 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [39]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of LI CHIONG for  
a Writ of Habeas Corpus.

**Order Allowing Appeal.**

Upon application and motion of C. C. BITTING,  
Assistant United States Attorney for the Territory  
of Hawaii:

IT IS HEREBY ORDERED that the petition for  
appeal heretofore filed herein by the United States  
of America be, and the same is hereby granted; and  
that an appeal to the United States Circuit Court of  
Appeals for the Ninth Circuit from the final order  
and judgment heretofore, on July 9, 1913, filed and  
entered herein, be, and the same is hereby allowed,  
and that a transcript of the record of all proceedings  
and papers upon which said final order and judgment  
was made duly certified and authenticated, be trans-  
mitted, under the hand and seal of the Clerk of this  
Court, to the United States Circuit Court of Appeals  
for the Ninth Judicial Circuit of the United States,  
at San Francisco, in the State of California.

Dated this 15th day of August, A. D. 1913.

(Sgd.) S. B. DOLE,  
Judge U. S. District Court.

Received a copy of the above order.

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By his Attorney,

---

[Endorsed]: No. 58. (Title of Court and Cause.)  
Order Allowing Appeal. Filed Aug. 15, 1913. A.  
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [40]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of LI CHIONG for  
a Writ of Habeas Corpus.

**Assignment of Errors.**

And now comes the United States of America, by  
C. C. BITTING, its attorney, and says that in the  
record and proceedings in the above-entitled matter  
there is a manifest error, and that the final record  
and judgment, made and entered in said matter on  
the 9th day of July, A. D. 1913, is erroneous and  
against the just rights of the said United States, in  
this, to wit:

First. That the Court was without jurisdiction to  
entertain the application for the writ of *habeas cor-  
pus*.

Second. That the merchant certificate presented  
by the applicant did not comply with the provisions  
of law in that it was not issued by the endorsement  
of the Diplomatic Representative of the United  
States at the port or place from which the person

named in the certificate was about to depart.

Dated this 15th day of August, A. D. 1913.

(Sgd.) C. C. BITTING,

Assistant United States Attorney.

Received a copy of the above assignment of errors.

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By his Attorneys,

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[Endorsed]: No. 58. (Title of Court and Cause.)  
Assignment of Errors. Filed Aug. 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [41]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of LI CHIONG for  
a Writ of Habeas Corpus.

**Citation on Appeal.**

United States of America,—ss.

The President of the United States, to Li Chiong,  
Greeting:

You are hereby cited and admonished to be and  
appear at the United States Circuit Court of Appeals  
for the Ninth Circuit to be held at city of San Fran-  
cisco, in the State of California, within thirty days  
from the date of this writ, pursuant to an order  
allowing an appeal, filed in the clerk's office of the  
United States District Court for the Territory of  
Hawaii, wherein the United States of America is ap-  
pellant, and you, Li Chiong, are appellee, to show

cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf. [42]

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 15th day of August, A. D. 1913, and of the Independence of the United States the one hundred and thirty-eighth.

S. B. DOLE,

Judge U. S. District Court, District of Hawaii.

[Seal]

Attest: A. E. MURPHY,

Clerk U. S. District Court, District of Hawaii.

[Endorsed]: No. 58. (Title of Court and Cause.)  
Citation on Appeal. Filed August 15, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [43]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of LI CHIONG for  
a Writ of Habeas Corpus.

**Praeceptum for Transcript.**

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:



1. Petition for a writ of *habeas corpus*, filed June 7, 1913.
2. Return of Richard L. Halsey, filed June 13, 1913.
3. Exceptions to demurrer—return and motion to discharge petitioner, filed June 13, 1913.
4. Motion to amend petition, filed June 13, 1913.
5. Traverse of petitioner to the return of respondent, filed June 13, 1913.
6. Decision, filed July 5, 1913.
7. Judgment discharging applicant, filed July 9, 1913.
8. Petition for appeal, filed Aug. 15, 1913.
9. Assignment of errors, filed Aug. 15, 1913.
10. Order Allowing appeal, filed Aug. 15, 1913.
11. Citation, filed Aug. 15, 1913.
12. All minute entries in above-entitled cause.
13. This praecipe.

Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, before the — day of —, A. D. 1913. [44]

THE UNITED STATES OF AMERICA.

By (Sgd.) C. C. BITTING,  
Assistant United States Attorney.

[Endorsed]: No. 58. (Title of Court and Cause.)  
Praecipe for Transcript. Filed Aug. 8, 1913. A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [45]



**[Certificate of Clerk U. S. District Court to  
Transcript of Record, etc.]**

*In the United States District Court in and for the  
District and Territory of Hawaii.*

No. 58.

In the Matter of the Application of LI CHIONG for  
a Writ of Habeas Corpus.

United States of America,  
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the District Court of the United States for the District of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 46, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the Matter of the Application of Li Chiong for a Writ of *Habeas Corpus*, as the same remains of record and on file in my office, and I further certify that I hereunto annex the original Citation on Appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$10.65, and that said amount has been charged by me in my account against the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 3d day of September, A. D. 1913.

[Seal]

A. E. MURPHY,  
Clerk, United States District Court, Territory of  
Hawaii. [46]

[Endorsed]: No. 2317. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Li Chiong, Appellee. In the Matter of the Application of Li Chiong for a Writ of *Habeas Corpus*. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Received and filed September 15, 1913.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 2317.

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	
vs.	
LI CHIONG,	}
<i>Appellee.</i>	

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IN THE MATTER OF THE APPLICATION OF  
LI CHIONG FOR A WRIT OF HABEAS CORPUS.

## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE.

This is an appeal from the judgment of the District Court of the Territory of Hawaii discharging Li Chiong, a Chinese citizen and a person of Chinese descent, upon a writ of *habeas corpus* from the custody of the immigration authorities who held the said Li Chiong in custody for the purpose of preventing him from entering the United States under the Chinese Exclusion Act.

The facts of the case are few and simple. Li Chiong presented himself for admission to the

United States to the immigration inspector at the port of Honolulu and demanded admission to the United States by reason of a certificate, commonly called a section 6 certificate, issued by the Chinese Consul-General at Manila and viséed by the Insular Collector of Customs at that port, certifying that the said Li Chiong was a merchant, and was interested in a business firm in Manila and had pursued the occupation of a merchant since 1904. This certificate was issued October 9, 1911, and viséed by the Insular Collector of Customs October 12, 1911. The petitioner, according to his own testimony, given to the immigration inspector, immediately upon receiving said certificate, left for China and resided in his village, Ching Foo, where he was married and lived up to the time he took passage for the United States. During the time he was in China he claims to have been doing nothing. On coming to the United States he had to pass through Manila and states that while the steamer was stopping at Manila he went ashore and visited his store.

At the time of applying for admission he claims to have been 24 years old and that he has been engaged in the mercantile business since 1904. His application for admission was made on the 7th day of May, 1913, so that at the time he became a merchant he was fifteen years of age. The only allegation of unfair hearing in the petition is that immigration authorities refused to give the said certificate the weight to which they claim it is entitled in law.

From the transcript it appears that the written

notice of motion to amend the petition so as to show some further particulars in which it was claimed that the petitioner was denied a fair hearing by the immigration authorities was filed with the clerk of the court but it nowhere appears that said motion was ever presented to the court for its ruling or that said petition was amended so as to include these other matters and no evidence appears in the transcript showing that it was considered by either party as of any consequence.

The immigration authorities denied the petitioner the right to land under a section 6 certificate on the ground that it had been a year and seven months since the certificate had been issued and that the testimony of the applicant showed that he had not visited his business except for a brief visit made while the steamer was stopping at the port of Manila on his voyage to the United States and that he has not followed a mercantile pursuit during said year and seven months and there was nothing to indicate except his word that he would follow a mercantile pursuit if he should enter the United States and therefore concluding that he had lost his mercantile status through his failure to follow it during this period of a year and seven months.

The court's opinion holds that the certificate is *prima facie* evidence of the petitioner's right to enter the United States, that there is no limit of time within which the same must be used, and that the immigration authorities had failed to produce satisfactory evidence to controvert the facts set forth in



the certificate to show that the alien had lost his mercantile status.

### THE LAW OF THE CASE.

The appellant contends that the order of the court below discharging the petitioner on a writ of *habeas corpus* should be reversed and the petitioner remanded to the custody of the immigration authorities for deportation, for the reason that the court had no jurisdiction to entertain the petition under the allegations thereof.

Section 6 of the Act of May 6, 1882, as amended by the Act of July 5, 1884, is as follows:

Sec. 6. That in order to the faithful execution of the provisions of this act, every Chinese person other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States.



If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid; provided, that nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired.

The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be viséed by the indorsement of the diplomatic representatives of the United States in the foreign country from which such certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same.

Such certificate viséed as aforesaid shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the Chinese inspector in charge of the port in the district in

the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

It will be observed that there is no allegation in the petition alleging a denial of a fair hearing to the petitioner on the part of the immigration authorities. There must be a direct and positive averment of a denial of a fair hearing by the immigration authorities in order to give the court jurisdiction.

*United States vs. Ju Toy*, 198 U. S. 253, 40 L. Ed. 1040;

*United States vs. Sing Tuck*, 194 U. S. 168;

*United States vs. Chin Yow*, 208 U. S. 8.

*Lem Moon Sing vs. United States*, 158 U. S. 538, 39 L. Ed. 1082;

*United States vs. Gin Fung*, 100 Fed. (9th C. C. A.) 389.

The court may not look into the record for the purpose of ascertaining whether or not there was any evidence against the alien. The burden of proof is upon the alien to establish his right to enter and if the immigration authorities refuse to believe the evidence presented by him, they may deny him his right to enter.

"Of course, if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that

he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the district court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced."

\* \* \* \* \*

"We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or rule 7, commented on in *United States vs. Sing Tuck*, 194 U. S. 161, 169, 170, 48 L. ed. 917, 921, 24 Sup. Ct. Rep. 621, as giving them some control or choice as to the witnesses to be heard. But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

*United States vs. Chin Yow, supra.*

"But jurisdiction is given to the collector over the right of the alien to land and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or

by rejecting proper evidence, or by admitting that which is improper."

*Lee Lung vs. Patterson*, 186 W. S. 168, 46 L. Ed. 1108.

This decision related to the question of an admission under a section 6 certificate and the order of the immigration authorities, to wit, the collector of the port, excluding the alien was upheld and the court refused to take jurisdiction and discharge the petitioner on a writ of *habeas corpus*.

The very wording of the act itself provides that the certificate is only *prima facie* evidence of the right of the Chinese person to land and that the same may be controverted.

If the evidence given by the alien is such that the immigration authorities come to the conclusion that it overcomes the *prima facie* case, made out by the certificate, the courts have no jurisdiction to review his action.

*Lee Lung vs. Patterson*, 186 U. S. 168, 46 L. Ed. 1108.

Should the court be of the opinion that it has jurisdiction to look into the record of the immigration authorities to ascertain whether or not there was any evidence to controvert the *prima facie* showing made by the section 6 certificate presented by Li Chiong we contend that the testimony of Li Chiong as presented by the transcript was sufficient for the immigration authorities to exclude him from the United States, bearing in mind always the state-

ments above quoted from the decisions of *Lee Lung vs. Patterson, supra*, and *United States vs. Chin Yow, supra*, in which it is specifically laid down that in order to give the court jurisdiction it is not sufficient to merely show that the decision of the immigration authorities was erroneous.

The evidence shows:

First: That he departed from a port in the Empire of China for the United States instead of departing from the port of Manila where his certificate was issued;

Second: That he lived in China after leaving Manila for a year and seven months, during which time he followed no mercantile pursuit;

Third: That considering his youth and the fact that he was paying no attention to the business during the year and seven months he was in China his interest in the firm was not in fact a substantial interest.

Fourth: That in coming to the United States he had no idea as to what occupation or business pursuit he would follow in the United States;

Fifth: That he was delayed on account of sickness is not borne out by the fact that he did not take sick for nearly a year after he left Manila;

Sixth: No reasonable explanation is given by the applicant for not having taken out a new section six certificate at the port in China from which he departed for the United States or not having taken out a new certificate in Manila showing his mercantile status there.



These facts clearly appearing from the testimony of Li Chiong even if it be considered that a total lack of evidence would entitle the court to review the decision of the immigration authorities can it be said that there is such a lack of evidence as to give the court jurisdiction.

We contend that upon the facts presented the decision of the immigration authorities was correct that the alien had lost his mercantile status at the time he applied for admission at Hawaii. But even if the court is inclined to disagree with the immigration authorities as to the conclusion of fact upon which they excluded Li Chiong from admission to the United States, yet that is not a ground upon which the court can take jurisdiction and discharge the petitioner upon a writ of *habeas corpus*.

We contend, therefore, that the judgment of the court below discharging Li Chiong should be reversed and the alien remanded to the custody of the immigration authorities for deportation to China.

Respectfully submitted,

JOHN W. PRESTON,  
United States Attorney,

EARL H. PIER,  
Special Assistant to United States Attorney,  
Attorneys for Appellant.



No. 2318

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United States  
**Circuit Court of Appeals**  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
VS.  
TSURUKICHI NAKAO,  
Appellee.

In the Matter of the Application of TSURUKICHI  
NAKAO for a Writ of Habeas Corpus.

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**Transcript of Record.**

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Upon Appeal from the United States District Court for  
the Territory of Hawaii.

**FILED**  
OCT 30 1913



No. 2318

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
TSURUKICHI NAKAO,  
Appellee.

In the Matter of the Application of TSURUKICHI  
NAKAO for a Writ of Habeas Corpus.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Territory of Hawaii.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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### **Names and Addresses of Attorneys.**

For the Petitioner, TSURUKICHI NAKAO:

J. LIGHTFOOT, Esq., Kapiolani Building,  
Honolulu, Hawaii.

For the Respondent, RICHARD L. HALSEY, Esq.,  
U. S. Immigration Inspector in Charge at  
the Port of Honolulu:

ROBERT W. BRECKONS, Esq., United  
States District Attorney, Honolulu, Hawaii.  
[1\*]

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*In the United States District Court in and for the  
District and Territory of Hawaii.*

No. 60.

In the Matter of the Application of TSURUKICHI  
NAKAO, for a Writ of Habeas Corpus.

#### **Statement [of Clerk U. S. District Court].**

##### **TIME OF COMMENCING SUIT:**

June 21, 1913: Verified petition for writ of *habeas corpus* filed and writ issued to the United States Marshal for the District of Hawaii.

##### **NAMES OF ORIGINAL PARTIES:**

Petitioner: TSURUKICHI NAKAO.

Respondent: RICHARD L. HALSEY, Esq., U.  
S. Inspector of Immigration in charge at the Port of  
Honolulu.

##### **DATES OF FILING OF THE PLEADINGS:**

June 21, 1913: Petition.

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\*Page-number appearing at foot of page of original certified Record.

June 26, 1913: Return of Richard L. Halsey.

June 26, 1913: Motion to Dismiss.

#### SERVICE OF PROCESS:

June 21, 1913: Writ issued and delivered to the United States Marshal for the District of Hawaii. Said Writ afterwards returned into Court with the following return by the said United States Marshal, to wit: "Received the within Petition, Order and Writ of *Habeas Corpus*, this 21st day of June, A. D. 1913, and returned as executed, by hand upon Richard L. Halsey, United States Inspector in Charge for the Port of Honolulu, by exhibiting to him the original Petition, Order and Writ of *Habeas Corpus* and [2] handing to and leaving with him a certified copy of same, this 21st day of June, A. D. 1913."

#### HEARINGS.

June 26, 1913: Hearing on Motion to Dismiss.

The above hearing was had before the Honorable Sanford B. Dole, Judge of said Court.

#### DECISION:

June 26, 1913: Decision Allowing Motion for Discharge and Ordering Petitioner Released from Custody.

#### JUDGMENT:

June 27, 1913: Judgment filed and entered.

#### PETITION FOR APPEAL:

August 15, 1913: Petition for Appeal filed and order allowing same signed. [3]

United States of America,  
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the United States Dis-

trict Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings showing the service of the writ herein and the time when the judgment herein was rendered and the Judge rendering the same, in the Matter of the Application of Tsurukichi Nakao for a Writ of *Habeas Corpus*, Number 60, in the United States District Court for the District of Hawaii.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 3d day of September, A. D. 1913.

[Seal]

A. E. MURPHY,

Clerk, United States District Court, District of Hawaii. [4]

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*In the District Court of the United States, in and for the District and Territory of Hawaii.*

In the Matter of the Application of TSURUKICHI NAKAO, for a Writ of Habeas Corpus.

**Petition for a Writ of Habeas Corpus.**

To the Honorable SANFORD B. DOLE, Judge of the District Court of the United States, in and for the District and Territory of Hawaii:

The undersigned, Tsurukichi Nakao, petitioner herein, respectfully shows unto your Honor:

**FIRST.**

That petitioner is a subject of the Empire of Japan.

## SECOND.

That petitioner came to the Hawaiian Islands in the month of November, 1892, aboard the steamer "Miike Maru," and remained in the Hawaiian Islands at Honomu, Hawaii, Heeia, Koolaupoko, Oahu, Ahuimano, Koolaupoko, aforesaid, and at Aiea Oahu, continuously from the said November, 1892, to the month of November, 1908.

## THIRD.

That on or about the month of November, 1908, petitioner received information that petitioner's mother, then residing in Hiroshima Ken, Japan, was extremely ill and not expected to live long, she being afflicted with paralysis; that thereupon your petitioner, being the eldest son of the family, and having already a younger brother named Wajiro Nakao living at Puunene, Island of Maui, felt it his duty to visit Japan for the purpose of comforting his said mother and remaining with her until such time as she should depart this life or become improved in health.

[5]

## FOURTH.

That your petitioner, accordingly, left Hawaii aboard the SS. "America Maru," in the month of November, 1908, intending to return to Hawaii after visiting his mother, and performing his filial duties to her as aforesaid, and petitioner never intended in any manner, to abandon or relinquish his rights to return to Hawaii as a domiciled alien.

## FIFTH.

That when petitioner arrived in Japan, he found that his mother was extremely ill, paralyzed, and in



almost daily expectation of death, and petitioner continued to live with his mother, whose illness was prolonged until the month of September, 1912, when petitioner's mother departed this life.

#### SIXTH.

That as soon as practicable after the death of petitioner's mother, petitioner concluded the business affairs of the family, his father having died many years ago, and returned to Hawaii, reaching the Port of Honolulu aboard the SS. "Siberia," on the 23d day of May, 1913.

#### SEVENTH.

That upon arrival at said Port of Honolulu, your petitioner was found to be afflicted with a disease known as Trachoma, and that after being certified by the medical officers of the United States Public Health and Marine Hospital Service, your petitioner was denied a landing in the Territory of Hawaii, he being allowed, however, to take an appeal to the Secretary of Commerce and Labor from the findings of the Board of Special Inquiry of the Immigration department; that your petitioner was not a domiciled alien, which said appeal, as your petitioner is informed and believes and upon such information and belief alleges and avers, was, by the Secretary of Commerce and Labor overruled. [6]

#### EIGHTH.

That the Board of Special Inquiry, in its finding that petitioner was not a domiciled alien of the United States, committed an error of law by reason of the fact that the evidence adduced before the said Board of Special Inquiry affirmatively show that

petitioner was and is a domiciled alien within the meaning of the laws of the United States.

#### NINTH.

That your petitioner is deprived of his liberty and imprisoned by Richard L. Halsey, Esquire, Immigration Inspector at said Port of Honolulu, as your petitioner is informed and believes, and upon such information and belief alleges and avers, on the grounds that your petitioner is an alien immigrant suffering from a dangerous, contagious disease, to wit, *Trachoma*, and your petitioner is further informed and believes and upon such information and belief alleges and avers, that it is the intention of said Richard L. Halsey, Esquire, to deport your petitioner to the Empire of Japan, by the first steamer leaving the Port of Honolulu for said Empire.

#### TENTH.

That the imprisonment and restraint aforesaid is illegal in this, that your petitioner is a domiciled alien who established his domicile in the United States of America by a residence of about sixteen years in the Hawaiian Islands, and that he never relinquished or gave up his rights as such domiciled alien, and is not an immigrant alien of an excluded class under the laws of the United States of America.

WHEREFORE, to be relieved of such unlawful detention, imprisonment and confinement as aforesaid, petitioner prays that a writ of *habeas corpus* issued out of this Honorable Court directed to said Richard L. Halsey, Esquire, Inspector as aforesaid, so that your petitioner may be brought before this Honorable Court to do, [7] submit to and receive



what the law may direct.

Dated, Honolulu, June 19th, A. D. 1913.

(Sgd.) In Japanese (TSURUKICHI NAKAO.)

United States of America,

Territory of Hawaii,—ss.

Tsurukichi Nakao, being first duly sworn, on oath deposes and says, that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein contained are true as he verily believes.

(Sgd.) In Japanese (TSURUKICHI NAKAO).

Subscribed and sworn to by the said Tsurukichi Nakao before me, and by me subscribed, on this 19th day of June, A. D. 1913.

[Seal] (Sgd.) B. N. KAHALEPUNA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Let the writ issue as prayed for returnable before me on the 20th day of June, 1913, at the hour of 2 o'clock P. M.

(Sgd.) S. B. DOLE,  
Judge United States District Court, Territory of  
Hawaii.

*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSURUKICHI  
NAKAO, for a Writ of Habeas Corpus.

**Writ of Habeas Corpus.**

The United States of America, to RICHARD L.  
HALSEY, Esq., United States Immigration In-  
spector, at the Port of Honolulu, Territory of  
Hawaii.

We command you that the body of Tsurukichi  
Nakao, in your custody detained, as it is said, to-  
gether with the day and cause of his caption and de-  
tention, you safely have before the Honorable San-  
ford B. Dole, Judge of our District Court of the  
United States, in and [8] for the District and  
Territory of Hawaii, on Thursday, the 26th day of  
June, A. D. 1913, at the hour of 2 o'clock P. M. of  
said day, to do and receive all and singular those  
things which said Judge shall then and there con-  
sider of him in this behalf; and have you then and  
there this Writ.

Witness the Honorable SANFORD B. DOLE,  
Judge of the District Court of the United States, in  
and for the District and Territory of Hawaii, this  
19th day of June, A. D. 1913.

[Seal]

A. E. MURPHY,

Clerk.

By (Sgd.) Wm. L. Rosa,

Deputy Clerk.

MARSHAL'S RETURN.

Received the within Petition, Order and Writ of *Habeas Corpus*, this 21st day of June, A. D. 1913, and returned as executed, by hand, upon Richard L. Halsey, United States Inspector in Charge for the Port of Honolulu, by exhibiting to him the original Petition, Order and Writ of *Habeas Corpus* and handing to and leaving with him a certified copy of same, this 21st day of June, A. D. 1913.

W. R. HENDRY,

By (Sgd.) D. K. Sherwood,

Office Deputy.

Dated, Honolulu, T. H., June 23, 1913.

[Endorsed]: No. 60. (Title of Court and Cause.)  
Petition, Writ and Order. Filed Jun. 21, 1913. A.  
E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy  
Clerk. [9]

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**[Order Allowing Motion for Discharge and Directing  
Relief of Petitioner from Custody, etc.]**

From the Minutes of the United States District  
Court, Vol. 8, Page 566, Thursday, June 26,  
1913.

[Title of Court and Cause.]

On this day came the above petitioner in person and with his counsel, Mr. J. Lightfoot, and also came the respondent, Richard L. Halsey, in person, and with Mr. C. C. Bitting, Assistant United States District Attorney, and this cause was called for hearing. Thereupon due argument having been heard upon motion for discharge herein, the said motion was by

the Court allowed and the petitioner herein ordered released from custody, whereupon Mr. Bitting having given notice of appeal herein, it was by the Court ordered that said petitioner furnish recognizance herein in the sum of \$500.00 pending said appeal.

[10]

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**[Return of U. S. Immigration Inspector to Writ of Habeas Corpus.]**

*In the United States District Court for the Territory of Hawaii.*

In the Matter of the Application of TSURUKICHI NAKAO for a Writ of Habeas Corpus.

RETURN OF RICHARD L. HALSEY, UNITED STATES IMMIGRATION INSPECTOR, AT THE PORT OF HONOLULU, TERRITORY OF HAWAII, TO THE WRIT OF HABEAS CORPUS ISSUED IN THE ABOVE-ENTITLED MATTER.

Comes now the respondent, Richard L. Halsey, and in obedience to the Writ of *Habeas Corpus* in this cause issued, now here presents the body of the said Tsurukichi Nakao as by said writ he is commanded to do.

And by way of return to the said writ your respondent admits that petitioner is a subject of the Empire of Japan, and also that upon arrival at the port of Honolulu the petitioner was found to be afflicted with a disease known as Trachoma, a dangerous, contagious disease.

That respondent has no knowledge or information as to the alleged facts contained in paragraphs sea

ond, third, fourth and fifth, and leaves the petitioner to his proof thereon if the same are material to the issues in this case, but respondent does admit that the petitioner reached the port of Honolulu aboard the Steamship "Siberia" on the 23d day of May, A. D. 1913.

Respondent further shows that petitioner was denied a landing in the Territory of Hawaii and at the port of Honolulu by the Board of Special Inquiry of the Immigration Department of the United States, located at said Port of Honolulu, and that an appeal to the Secretary of Labor was taken by the petitioner from such finding and determination by the said Board of Special Inquiry, and that the findings of the Board of Special Inquiry were conclusions of fact and not an error of law as alleged by petitioner in paragraph [11] eighth of his said petition.

Your respondent denies that petitioner is a domiciled alien who has established his domicile in the United States of America, and says that if ever such alien did acquire or had acquired a residence and domicile in the United States of America he abandoned the same by a continuous and uninterrupted residence for five years in the Empire of Japan, where or about said period or time he lived and resided, cultivating his own land and living upon his own home, and in every way living and acting as a resident in said Empire of Japan, as is more particularly and fully shown by the testimony given by said applicant under oath before the Board of Special Inquiry convened upon his *applicant* at said port of Honolulu, on May 29, 1913, and a copy of which said



testimony, together with the findings of the Board of Special Inquiry thereon, and the confirmation by the Secretary of Labor of said findings, are attached hereto and made a part hereof as fully as if set out in words and figures herein.

That the hearing before said Board of Special Inquiry was fair, full and impartial, and that the findings of said Board of Special Inquiry having been confirmed and approved by the Secretary of Labor upon the appeal of the petitioner, the said proceedings denying petitioner the right to enter the United States have become final and conclusive, and that this Court is without jurisdiction in the premises.

(Sgd.) RICHARD L. HALSEY,  
United States Immigration Inspector at the Port of  
Honolulu.

United States of America,  
Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn according to law, deposes and says that he is the Richard L. Halsey who has made the return to the writ of *habeas corpus* in the above-entitled cause; that he has read the said return and knows the contents thereof, and [12] that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 26th day of  
June, A. D. 1913.

[Seal] (Sgd.) WM. L. ROSA,  
Deputy Clerk, United States District Court, Ter-  
ritory of Hawaii.



**Medical Certificate.**

Port of Honolulu, T. H.,

Date, May 28, 1913.

Name—TSURUKICHI NAKAO.

Age—45, Sex, M.

Native of Japan. Race, Japanese. Date arrival,  
May 26, 1913, S. S. Siberia.

Class—Manifest No. K—1—28

THIS IS TO CERTIFY that the above-described person has this day been examined and is found to be afflicted with trachoma, a dangerous, contagious disease, which in my opinion cannot be cured in 60 days.

(Signed) F. E. TROTTER, Surgeon,  
Public Health and Marine Hospital Service.

**[Record of Board of Special Inquiry, May 29, 1913.]**

U. S. IMMIGRATION SERVICE,

Port of Honolulu, T. H.

Record of Board of Special Inquiry, convened May  
29, 1913.

Members of Board: Harry B. Brown, Edwin Farmer, and Merlen J. Moore.

Case of TSURUKICHI NAKAO, KI 28, Ex. S.S.  
SIBERIA. May 26, 1913.

Interpreter, Katsunuma.

Applicant, sworn by Inspector Farmer, testifies:

Q. What is your name and age?

A. Tsurukichi Nakao. 45 years old.

Q. Is any person travelling with you? A. No.

Q. Where were you born?

A. At Yagi Mura, Hiroshima Ken, Japan.

Q. Where have you been living?

A. At Yagi Mura—the same place where I was born. [13]

Q. Are you married or single?

A. Married. My wife, Chiye, 24 years old, is in Japan.

Q. When were you married?

A. Three years ago, in Japan.

Q. Have you any children?

A. No; I had one boy, but he is dead.

Q. Were you ever married before? A. No.

Q. Can you read and write? A. No.

Q. On which ship did you arrive, and from what port? A. On the S.S. "Siberia," from Kobe.

Q. Who paid your passage? A. Myself.

Q. What is your occupation? A. Farmer.

Q. Where is your farm?

A. At Yagi Mura, Japan.

Q. How long have you been a farmer?

A. About five years.

Q. Were you ever in the United States before?

A. Yes.

Q. When and where?

A. I was in Hawaii for 16 years and returned to Japan in 1908.

Q. What did you do while you were in Hawaii?

A. Plantation work.

Q. Where did you live in Hawaii?

A. At Honomou, Hawaii, first. Then I went to Heeia, Oahu. I then worked two years for Mr. Macfarlane, as a dairyman, at Ahuimanu. Then I moved to Aiea Plantation, Oahu, and returned to Japan from Aiea.

Q. To whom are you going?

A. I am intending to go to Aiea this time.

Q. To any person?

A. To the plantation only.

Q. Have you promise of work on the plantation?

A. The boss told me that if I would come back he would give me a job again.

Q. Was that before you went away?

A. Yes; that was before I left Hawaii in 1908.

Q. Have you notified any one of your arrival?

A. No.

Q. How much money have you?      A. \$7.00.

Q. Was your wife ever in Hawaii?      A. No.

Q. When you left Hawaii, was it your intention to come back?      A. I intended to come back again.

Q. Did you intend to come back soon, or at any particular time, or did you simply intend to come back some time?

A. I intended to come back sooner, but my mother was sick, and so I could not come.

Q. How soon did you intend to come back?

A. Right away.

Q. Within a year, or sooner, or longer?

A. I intended to come back in about one year.

Q. Was your mother sick before you went to Japan, or was she taken sick after you got there?

A. I received notice that she was sick, and so I went to Japan.

Q. How long was your mother sick?

A. Until September last year, when she died.

Q. So, she was sick four years, was she?

A. Yes; she was paralyzed.

Q. If she had been sick ten years would you have stayed there until she was cured or until she died? A. Yes.

Q. If her sickness had continued for 20 years, would you have stayed there?

A. Yes; I would have stayed with her.

Q. Then, the fact of your coming back to Hawaii was dependent on the duration of your mother's sickness, was it? A. Yes.

Q. Do you know how long a person afflicted with paralysis may live?

A. You cannot tell. Sometimes the second attack kills them right away. But I could not tell.

Q. Did you not know that it might be possible for one paralyzed to live many years?

A. Yes, I knew it.

Q. Then, your return to Hawaii was dependent on a very uncertain event? A. It was.

Q. Is your father living? A. No.

Q. When did he die?

A. When I was 12 years old. [14]

Q. Who is the oldest son in your family?

A. I am.

Q. Then when your father died, you succeeded to his property, did you?

A. Yes, I did; when I became of age.

Q. Have you still the property you received from your father?

A. I have sold it now, and deposited the money with my wife's elder brother.

A. When did you sell it?

A. In January of this year.

Q. How much land was there?

A. 1200 yen, or \$600.00.

Q. That was the value; but how many acres were there?

A. About half an acre; and there is a house on it.

Q. Is that the farm you spoke of at first?

A. That was part of it, and besides that I leased about an acre and a half.

Q. Have you been working that land ever since you went to Japan?      A. Yes.

Q. Then, as I understand it, you left Hawaii, went to Japan about five years ago, and have pursued a regular occupation, living there with your family, intending however, to return to Hawaii sometime, in case your mother should die or should get well?

A. Yes.

Q. Have you any further statement to make?

A. I would like to be landed.

(Japanese Characters.)

Subscribed and sworn to before me, this 29th day of May, 1913.

(Sgd.) EDWIN FARMER,  
Immigration Inspector.

The foregoing testimony has been translated by me to the affiant named herein, and before signing the same he acknowledged it to be a correct record and fully understood by him.

(Sgd.) TOMIZO KATSUNUMA.

Interpreter.

Applicant is certified by the examining surgeon of the U. S. P. H. S. as being afflicted with TRACHOMA, a dangerous, contagious disease.

EDWIN FARMER.—I move that applicant be



denied admission and returned to Japan, this decision being based on the certificate of the examining surgeon that he is afflicted with TRACHOMA, a dangerous, contagious disease.

MERLEN J. MOORE.—I second the motion.

HARRY B. BROWN.—It is so ordered.

EDWIN FARMER.—I am of the opinion that this applicant never acquired a domicile in Hawaii, as he retained his property in Japan all the time he was in Hawaii. However, he might possibly say that he did not dispose of it because his mother was living. But, as he has, for the past five years lived in Japan, with his family, pursuing his regular occupation, intending some time to return to Hawaii, his return depending on an indefinite and uncertain event, he has relinquished his domicile in Hawaii, if he ever had one, and I move that this be the opinion of the Board.

MERLEN J. MOORE.—I am of the same opinion.

HARRY B. BROWN.—I also concur.

HARRY B. BROWN.—(To Applicant.) You have been denied admission to the United States on account of being certified by the examining surgeon of the U. S. P. H. S. as being afflicted with TRACHOMA; a dangerous, contagious disease. From this decision there is no appeal, but you may appeal to the Secretary of Labor at Washington on the question of domicile, if you desire to do so. It is the opinion of the Board that you have relinquished your domicile in Hawaii, if you ever acquired one here. You have 48 hours in which to decide whether or not you will appeal. Do you want to appeal now, *do*



want time to consider, or is it your desire to waive your right [15] of appeal?

A. I am going to appeal.

Q. Do you want an attorney?

A. I will appeal without a lawyer.

HARRY B. BROWN.—(To Applicant.) If your appeal is dismissed you will be returned to Japan at the expense of the steamship company which brought you to Hawaii.

(Sgd.) HARRY B. BROWN,

(Sgd.) EDWIN FARMER,

(Sgd.) MERLEN J. MOORE,

Board of Special Inquiry.

CABLEGRAM.

The following cablegram received “VIA COMMERCIAL PACIFIC.”

Received S. 35 AM      BDN      Jun. 18, 1913.  
16 USG. WASHINGTON, DC.

IMMIGRATION HONOLULU.

DEDICANT TSURUKICHI NAKAO AND TO-  
TARO FUJIMOTO

CAMINETTI.

(DEDICANT:—Secretary has affirmed excluding decision board and directs deportation.)

Bureau Circular No. 17, May 1, 1913.

[Endorsed]: No. 60. (Title of Court and Cause.)  
Return of Richard L. Halsey. Filed Jun. 26, 1913.  
A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa,  
Deputy. [16]

*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSURUKICHI  
NAKAO, for a Writ of Habeas Corpus.

**Motion to Dismiss.**

Now comes Tsurukichi Nakao, by his attorney, J. Lightfoot, and moves this Honorable Court for an order herein discharging the above-named petitioner from custody on the ground that the return filed herein, by Richard L. Halsey, Esquire, does not show any lawful ground for the continued imprisonment, restraint and confinement of said petitioner.

This motion is based on the record in the above-entitled Court and cause.

Dated, Honolulu, June 26th, A. D. 1913.

(Sgd.) J. LIGHTFOOT,  
Attorney for Petitioner.

[Endorsed]: No. 60. (Title of Court and Cause.)  
Motion to Dismiss. Filed Jun. 26, 1913. A. E.  
Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy  
Clerk. [17]

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*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSURUKICHI  
NAKAO for a Writ of Habeas Corpus.

**Judgment.**

At the regular April A. D. 1913 Term of the District Court of the United States, for the District and Territory of Hawaii, held in the courtroom of said

court, in the city of Honolulu, District and Territory aforesaid, on Thursday the 26th day of June, A. D. 1913, the above-entitled cause having been heard on the pleadings and arguments of counsel for the respective parties, and due deliberation had thereon, the Court finds that the above-named petitioner, Tsurukichi Nakao, is entitled to be discharged, subject to the taking of an appeal, in which case he may be released upon giving a recognizance with sureties in the sum of Five Hundred Dollars (\$500.00) to answer the judgment of the appellate court.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the above-named petitioner, Tsurukichi Nakao, be, and he is hereby discharged from custody herein, subject to the taking of an appeal.

And the Court being advised that the above-entitled action will be removed to the Appellate Court by proper proceedings to be had in that behalf.

It is hereby further ordered, adjudged and decreed that the above-named petitioner, Tsurukichi Nakao, give his recognizance with surety in the sum and amount of Five Hundred Dollars to answer the [18] Judgment of the Appellate Court; and that upon the giving of such recognizance, the said petitioner, Tsurukichi Nakao, be released from custody.

Given, made and dated at Honolulu, Territory of Hawaii, this 27th day of June, A. D. 1913.

(Sgd.) S. B. DOLE,  
Judge.

O. K.—(Sgd.) C. C. BITTING,  
Asst. U. S. Attorney.

[Endorsed]: No. 60. (Title of Court and Cause.) Judgment. Entered in J. D., Book 2, at page 426. Filed June 27th, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [19]

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*In the District Court of the United States, in and for the District and Territory of Hawaii.*

In the Matter of the Application of TSURUKICHI NAKAO for a Writ of Habeas Corpus.

**Recognizance.**

The United States of America,  
Territory and District of Hawaii,—ss.

Be it remembered, that on the 30th day of June, A. D. 1913, before me, Foster L. Davis, Deputy Clerk of the District Court of the United States within and for the Territory and District of Hawaii, duly appointed by said Court and duly qualified and acting as such deputy clerk, personally came Tsurukichi Nakao, as principal, and S. Deai and K. Oki, as sureties, and jointly and severally acknowledge themselves to owe the United States of America the sum of Five Hundred Dollars (\$500.00), to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION OF THIS RECOGNIZANCE is such, that whereas, by the judgment of the above-entitled court in the above-entitled action dated June 26th, 1913, the above-named Tsurukichi Nakao was ordered discharged from custody, subject to the taking of an appeal; and

WHEREAS, said Court, being advised that the

above-entitled action will be removed to the Appellate Court by proper proceedings in that behalf, further ordered that said Tsurukichi Nakao give his recognizance with surety in the sum and amount of Five Hundred Dollars (\$500.00) to answer the judgment of the Appellate Court, and that, upon the giving of such recognizance, said Tsurukichi [20] Nakao shall answer, abide by and render himself in execution of, and obey, all orders and judgment of the Appellate Court herein, whether that Appellate Court be the United States Circuit Court of Appeals for the Ninth Circuit or the Supreme Court of the United States, and in all respects subject himself to whatever action may be taken in or by such Appellate Court, then this recognizance to be void; otherwise to remain in full force, virtue and effect.

Witness to signature in Japanese:

(Sgd.) In Japanese,  
Principal.

(Sgd.) F. K. MAKINO.

(Sgd.) S. DEAI, Surety.

(Sgd.) K. OKI, Surety.

Taken and acknowledged before me the day and year first above written.

[Seal] (Sgd.) F. L. DAVIS,  
Deputy Clerk, United States District Court.

United States of America,  
Territory and District of Hawaii,—ss.

S. Deai and K. Oki, parties to the above bond, being duly sworn, do depose and say, each for himself, that he is worth the sum of Five Hundred Dollars (\$500.00) over and above his just debts, liabilities



and exemptions, and that his property is situate in said Territory and subject to execution.

(Sgd.) S. DEAL.

(Sgd.) K. OKI.

Subscribed in my presence and sworn to before me this 27th day of June, A. D. 1913.

[Seal] (Sgd.) F. L. DAVIS.

Deputy Clerk, United States District Court.

Approved as to form and as to sufficiency of sureties.

(Sgd.) C. C. BITTING,

Assistant United States District Attorney.

Approved: (Sgd.) S. B. DOLE,

Judge. [21]

[Endorsed]: No. 60. (Title of Court and Cause.)  
Recognizance. Filed Jun. 30, 1913. A. E. Murphy,  
Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [22]

*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSURUKICHI  
NAKAO for a Writ of Habeas Corpus.

**Petition for Appeal.**

To the Honorable SANFORD B. DOLE, Judge of  
the Above-entitled Court:

THE UNITED STATES OF AMERICA, by its attorney, C. C. BITTING, conceiving itself aggrieved by the order and judgment made and entered on the 27th day of June, A. D. 1913, in the above-entitled proceeding, does hereby appeal from the said order and judgment to the Circuit Court of Ap-



peals for the Ninth Circuit, and files herewith its assignment of errors intended to be urged upon appeal, and it prays that its appeal may be allowed, and that a transcript of the record of all proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit of the United States.

Dated this 15th day of August, A. D. 1913.

(Sgd.) C. C. BITTING,

Assistant United States Attorney.

Received a copy of the above petition.

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By his Attorney,

[23]

[Endorsed]: No. 60. (Title of Court and Cause.)  
Citation on Appeal. Filed Aug. 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [24]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSURUKICHI  
NAKAO for a Writ of Habeas Corpus.

**Order Allowing Appeal.**

Upon application and motion of C. C. BITTING,  
Assistant United States Attorney for the Territory  
of Hawaii:

IT IS HEREBY ORDERED that the petition  
for appeal heretofore filed herein by the United  
States of America be, and the same is hereby granted;

and that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment heretofore, on June 27th, 1913, filed and entered herein, be and the same is hereby allowed, and that a transcript of the record of all proceedings and papers upon which said final order and judgment was made, duly certified and authenticated, be transmitted, under the hand and seal of the Clerk of this Court, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California.

Dated this 15th day of August, A. D. 1913.

(Sgd.) S. B. DOLE,

Judge U. S. District Court.

Received a copy of the above order.

---

By his Attorney:

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[25]

[Endorsed]: No. 60. (Title of Court and Cause.)  
Order Allowing Appeal. Filed Aug. 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [26]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSURUKICHI  
NAKAO for a Writ of Habeas Corpus.

**Assignment of Errors.**

And now comes the United States of America, by  
C. C. BITTING, its attorney, and says that in the

record and proceedings in the above-entitled matter there is a manifest error, and that the final record and judgment, made and entered in said matter on the 27th day of June, A. D. 1913, is erroneous and against the just rights of the said United States, in this, to wit:

First. That the Court erred in granting the writ of *habeas corpus* herein.

Second. That from the issuing made by the petitioner, it appeared that the proceedings were final before the immigration authorities, and that this Court had no jurisdiction in the matter.

Third. That it appeared from the petition that the applicant was afflicted with a dangerous, contagious disease, and on account thereof was not entitled to enter the United States of America through the port of Honolulu, or any other port in said United States of America.

Fourth. That it appeared from the face of the petition itself, that the immigration authorities of the United States of America offered to permit the applicant to obtain hospital treatment and which offer was by the petitioner refused, and if upon no other ground, the immigration authorities were right in refusing the [27] petitioner an entrance, and the Court erred in entertaining or issuing a writ of *habeas corpus*.

Fifth. That it appears upon the face of the petition that for about five years the alien applicant had been living in the country of his nativity, to wit, in the Empire of Japan, subject to the jurisdiction thereof, living upon and cultivating his own land and

pursuing the regular occupation of a resident and citizen of said Empire of Japan, and had abandoned his domicile, if any such was ever acquired, within the Territory of Hawaii and the jurisdiction of the Court.

Sixth. The Court erred in sustaining the petition for the writ of *habeas corpus* in allowing said writ, and in ordering the discharge of the applicant under said writ, and his entrance into the United States of America through the port of Honolulu, Territory of Hawaii, and within the jurisdiction of the Court.

Seventh. And for other and manifest errors apparent upon the record in the above-entitled cause and too numerous to be set out herein.

Dated this 15th day of August, A. D. 1913.

(Sgd.) C. C. BITTING,

Assistant United States Attorney.

Received a copy of the above assignment of errors.

---

By his Attorney,

---

[Endorsed]: No. 60. (Title of Court and Cause.)  
Assignment of Errors. Filed Aug. 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [28]

*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSURUKICHI  
NAKAO for a Writ of Habeas Corpus.

**Citation on Appeal.**

United States of America,—ss.

The President of the United States, to Tsurukichi  
Nakao, Greeting:

You are hereby cited and admonished to be and  
appear at the United States Circuit Court of Ap-  
peals for the Ninth Circuit, to be held at the city of  
San Francisco, in the State of California, within  
thirty days from the date of this writ, pursuant to  
an order allowing an appeal, filed in the Clerk's  
office of the United States District Court for the Ter-  
ritory of Hawaii, wherein the United States of  
America is appellant, and you, Tsurukichi Nakao,  
are appellee, to show cause, if any there be, why the  
judgment in said appeal mentioned should not be cor-  
rected, and speedy justice should not be done to the  
parties in that behalf. [29]

Witness the Honorable EDWARD DOUGLASS  
WHITE, Chief Justice of the Supreme Court of the  
United States of America, this 15th day of August,  
A. D. 1913, and of the Independence of the United  
States the one hundred and thirty-eighth.

S. B. DOLE,

Judge U. S. District Court, District of Hawaii.

[Seal]

Attest: A. E. MURPHY,

Clerk U. S. District Court.



Received a copy of within citation.

\_\_\_\_\_,  
By his Attorney,  
\_\_\_\_\_,

[Endorsed]: No. 60. (Title of Court and Cause.)  
Citation on Appeal. Filed August 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [30]

\_\_\_\_\_  
*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSURUKICHI  
NAKAO for a Writ of Habeas Corpus.

**Praeceptum for Transcript.**

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record  
in this cause, to be filed in the office of the Clerk of  
the United States Circuit Court of Appeals for the  
Ninth Judicial Circuit, and include in said transcript  
the following pleadings, proceedings and papers on  
file, to wit:

1. Petition for writ of *habeas corpus* and writ,  
filed June 21, 1913.
2. Return of Richard L. Halsey, filed June 26,  
1913.
3. Motion to dismiss, filed June 26, 1913.
4. Judgment, filed June 27, 1913.
5. Recognizance, filed June 30, 1913.
6. Petition for appeal, filed \_\_\_\_\_, 1913.
7. Assignment of errors, filed \_\_\_\_\_.
8. Order allowing appeal, filed \_\_\_\_\_.



9. Citation, filed ———.
10. All minute entries in above-entitled cause.
11. This praecipe. [31]

Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, before the 15th day of September, A. D. 1913.

THE UNITED STATES OF AMERICA.

By (Sgd.) C. C. BITTING,  
Assistant United States Attorney.

[Endorsed]: No. 60. (Title of Court and Cause.)  
Praecipe for Transcript. Filed Aug. 8, 1913. A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [32]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record, etc.]**

*In the United States District Court in and for the  
District and Territory of Hawaii.*

No. 60.

In the Matter of the Application of TSURUKICHI  
NAKAO for a Writ of Habeas Corpus.

United States of America,  
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the District Court of the United States for the District of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 33, inclusive are a true and complete tran-

script of the record and proceedings had in said court in the matter of the Petition of Tsurukichi Nakao for a Writ of *Habeas Corpus*, as the same remains of record and on file in my office, and I further certify that I hereunto annex the original citation on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$9.20, and that said amount has been charged by me in my account against the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 3d day of September, A. D. 1913.

[Seal] A. E. MURPHY,  
Clerk, United States District Court, Territory of  
Hawaii. [33]

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[Endorsed]: No. 2318. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Tsurukichi Nakao, Appellee. In the Matter of the Application of Tsurukichi Nakao for a Writ of *Habeas Corpus*. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Received and filed September 15, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

No. 2318.

IN THE

**UNITED STATES CIRCUIT COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,  
*Appellant,*

VS.

TSURUKICHI NAKAO,  
*Appellee.*

---

IN THE MATTER OF THE APPLICATION OF  
TSURUKICHI NAKAO FOR A WRIT OF HABEAS  
CORPUS.

**BRIEF OF APPELLANT**

Upon Appeal from the United States District Court for  
the Territory of Hawaii.

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STATEMENT OF THE CASE.

This is an appeal on the part of the government from a judgment of the District Court of the United States in and for the District of Hawaii discharging upon a writ of *habeas corpus* the said Tsurukichi Nakao. The District Court of Hawaii evidently determined the case upon the pleadings.

The petition for the writ sets forth that the petitioner was a subject of the Emperor of Japan; that he came to the Hawaiian Islands in November, 1892, and remained there until November, 1908; that he returned to Japan upon receiving word that his mother was ill and afflicted with paralysis and being the eldest son of the family, felt it his duty to remain with his mother for the purpose of comforting her as long as she lived or until she should be improved in health, and that he returned solely for the purpose of comforting his mother and performing his filial duties; that at the time he left he never intended to abandon or relinquish his rights to return to Hawaii as a domiciled alien; that when he reached Japan he found his mother extremely ill and that her illness continued until the time of her death which occurred in September, 1912; that as soon as practicable after the death of his mother he returned to Honolulu and arrived there on the 23rd day of May, 1913; that upon his arrival at the port of Hawaii, the medical officers of the United States Public Health and Marine Hospital Service found that he was afflicted with the disease known as trachoma and he was thereupon denied a landing in the Territory of Hawaii; that the Board of Special Inquiry found that he was not a domiciled alien; that he took an appeal from the decision of the Board of Special Inquiry that he was not a domiciled alien to the Secretary of Labor, which appeal was overruled; that the Board of Special Inquiry committed an error of law by reason of the fact that the evidence adduced before the Board

of Special Inquiry affirmatively showed that the petitioner was a domiciled alien within the meaning of the laws of the United States. He further alleges that Richard L. Halsey, Immigration Inspector at the port of Honolulu, intends to deport the said Tsurukichi Nakao on the ground that he is an alien immigrant suffering from a dangerous, contagious disease, to wit, trachoma, and alleges that he is imprisoned and restrained of his liberty illegally in that he is a domiciled alien whose domicile was in the United States, established by a residence of about sixteen years in the Hawaiian Islands and that he never relinquished his domicile and therefore does not come within the excluded classes.

The return of the Immigration Inspector sets forth that the petitioner is a subject of the Empire of Japan and upon his arrival in Honolulu was found to be afflicted with the disease known as trachoma, which is a dangerous, contagious disease; puts the petitioner to his proof on all questions as to residence prior to his coming to Honolulu on the 23rd day of May, 1913, but admits his arrival at the port of Honolulu on that day; alleges that the findings of the Board of Special Inquiry and the Secretary of Labor were conclusions of fact and not conclusions of law and denies that the petitioner is a domiciled alien who has established his domicile in the United States and that if he did acquire a residence and domicile in the United States, he abandoned the same by reason of his continuous and uninterrupted residence for five years in the Empire of Japan; and relies upon



the proceedings before the Board of Special Inquiry which are attached to the return of the Immigration Inspector. This record contains the medical certificate of the doctor to the effect that the said Tsurukichi Nakao has been examined and found to be afflicted with trachoma, a dangerous, contagious disease, which in the opinion of the surgeon cannot be cured within sixty days, and has also attached the record of the testimony and the warrants of the Board of Special Inquiry upon the evidence excluding the alien; also the warrant of the Secretary of Labor as shown by a telegram from the Commissioner General of Immigration. Upon this record attorney for petitioner made a motion to dismiss, whereupon the Court entered the order discharging the petitioner.

### THE LAW OF THE CASE.

The respondent contends that the order of the Court below discharging the petitioner on a writ of *habeas corpus* should be reversed and the petitioner remanded to the custody of the immigration authorities for deportation, on two grounds:

FIRST: THAT THE COURT HAD NO JURISDICTION TO ENTERTAIN THE PETITION UNDER THE ALLEGATIONS OF THE PETITION AND THE EVIDENCE PRESENTED.

SECOND: THAT UPON THE EVIDENCE PRESENTED TO THE BOARD OF SPECIAL INQUIRY ITS ORDER EXCLUDING THE ALIEN FROM ADMISSION TO THE UNITED STATES WAS PROPER.

Under the first heading it will be observed that

there is no allegation in the petition alleging the setting forth of a denial of a fair hearing to the petitioner on the part of the Board of Special Inquiry or the Secretary of Labor. Such being the case, the matter is governed by the decision of the *United States vs. Ju Toy*, 198 U. S. 253, 40 L. Ed. 1040.

"We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of *United State vs. SingTuck*, 194 U. S. 161, 48 L. Ed. 917, 921, 24 Sup. Ct. Rep. 621: 'A petition for *habeas corpus* ought not to be entertained unless the Court is satisfied that the petitioner can make out at least a *prima facie* case.' This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence, or allege its effect."

The finding of the Secretary of Labor that the alien is not domiciled in the United States is conclusive upon the alien.

*United States vs. Ju Toy*, 198 U. S. 1043;  
*United States vs. Sing Tuck*, 194 U. S. 168, 48  
 L. Ed. 917;  
*United States vs. Chin Low*, 208 U. S. 8, 52 L.  
 Ed. 369;  
*Ecker vs. United States*, 142 U. S. 651;  
*How Moy vs. North*, 183 Fed. 89.

The basis for jurisdiction for the issuance of a writ of *habeas corpus* by the District Court is based entirely upon the question as to whether or not the alien has been given a fair hearing by the immigration authorities.

*United States vs. Chin Yow, supra.*

"Of course, if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing the case can proceed no further. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. \* \* \*

"We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce; or rule 7, commented on in *United States vs. Sing Tuck*, 194 U. S. 161, 169, 170, 48 L. Ed. 917, 921, 24 Sup. Ct. Rep. 621, as giving them some control or choice as to the witnesses to be heard. But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

In this case there is no allegation or proof whatsoever tending to show that the alien was not given a fair hearing in this matter, and the Secretary's ruling must prevail. The allegation that he is a domiciled alien does not take his case out from under the reasoning of those cases, for in each of the cases I have cited the alien claimed to be a citizen of the United States.

With much stronger force would the same reasoning apply to the alien claiming domicile.

The reasoning in these cases is not confined to the Chinese Exclusion Act, but is likewise applicable to cases arising under the Immigration Act.

*United States vs. Low Wah Suey*, 225 U. S. 460.

The terms of the Immigration Act under which this alien was ordered deported provides:

"Sec. 6. That the decision of the Board of Special Inquiry hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to rejection of aliens afflicted with tuberculosis or with a loathsome or dangerous, contagious disease or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission into the United States under section 2 of this Act."

Section 25 is the matter referred to in section 10, which section, after providing for the appointment of boards of special inquiry, is as follows:

"Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before boards shall be separate and apart from the public, but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decision of any two members of a board shall prevail, but either the alien or any dissenting member of the said board may appeal through the Commissioner of Immigration at the port of arrival and the Commissioner-General of Immigration to the Secretary of Commerce and Labor, and the taking of such appeal



shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the Commissioner of Immigration at the port of arrival of such decision, which shall be rendered solely upon the evidence adduced before the Board of Special Inquiry; *provided*, that in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor; but nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this Act."

It thus appears that the order of the Board of Special Inquiry excluding the alien, based upon the medical certificate that the alien was suffering with a dangerous, contagious disease, is final and the Court has no power nor authority to review its decision.

The contention of the alien that he domiciled in the United States and therefore not subject to the immigration laws has been decided adversely by the Supreme Court.

*Anna Lapina vs. William Williams*, Commissioner of Immigration, opinion by Justice Whitney, rendered January 5, 1914. Advance Sheets Lawyers' Edition, Feb. 14, 1914, page 196.

The transcript (Tr. ) affirmatively shows that the alien was offered hospital treatment and refused the same, thereby not complying with Immigration rule 19 for the admission of aliens. Not having exhausted



his remedy in the department, he is not entitled to apply to the courts.

*United States vs. Sing Tuck*, 194 U. S. 168;  
*United States vs. Jew Toy*, 198 U. S. 1043;  
*Eiku vs. United States*, 142 U. S. 651.

SECOND: THAT UPON THE EVIDENCE PRESENTED TO THE BOARD OF SPECIAL INQUIRY ITS ORDER EXCLUDING THE ALIEN FROM ADMISSION TO THE UNITED STATES WAS PROPER.

Without waiving in any way the position hereinbefore taken, we contend that the alien should be deported on the record made out before the Board of Special Inquiry. The alien although domiciled in the United States, when he has left the same and presents himself for readmission to the United States is in the same position as any other alien who may never have been in the United States before.

*Anna Lapina vs. William Williams*, Commissioner of Immigration, Advance Sheets Lawyers' Edition, Feb. 1, 1914, page 196.

The alien was suffering from a loathesome, dangerous, contagious disease, to wit, trachoma, as is shown by the medical certificate of Dr. Trotter of the Public Health and Marine Hospital Service at Honolulu and having refused medical treatment offered him under rule 19, of the Immigration Rules and Regulations, is subject to deportation and should be refused admission under sections 2, 10 and 25 of the Immigration Act, which excluded aliens afflicted with tubercu-

losis or with a loathsome or dangerous contagious disease.

We contend that this case should be reversed and the alien remanded to the custody of the Immigration Inspector for deportation.

Respectfully submitted,

JOHN W. PRESTON,  
United States Attorney,

EARL H. PIER,  
Special Assistant to United States Attorney,  
Attorneys for Appellant.

No. 2319

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
TSUNEZO KUSANO,  
Appellee.

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the Territory of Hawaii.

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FILED

OCT 30 1913



No. 2319

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,

vs.

TSUNEZO KUSANO,  
Appellee.

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the Territory of Hawaii.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

For the Petitioner, TSUNEZO KUSANO:

J. LIGHTFOOT, Esq., Kapiolani Building,  
Honolulu, Hawaii.

For the Respondent, RICHARD L. HALSEY, Esq.,  
U. S. Immigration Inspector in Charge at the  
Port of Honolulu:

ROBERT W. BRECKONS, Esq., United States  
District Attorney, Honolulu, Hawaii. [1\*]

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*In the United States District Court in and for the  
District and Territory of Hawaii.*

No. 61.

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Statement [of Clerk U. S. District Court].**

TIME OF COMMENCING SUIT:

June 28, 1913: Verified petition for writ of *habeas corpus* filed and writ issued to the United States Marshal for the District of Hawaii.

NAMES OF ORIGINAL PARTIES:

Petitioner: TSUNEZO KUSANO.

Respondent: RICHARD L. HALSEY, Esq., U. S. Inspector of Immigration in charge at the Port of Honolulu.

DATES OF FILING OF THE PLEADINGS:

June 28, 1913: Petition.

July 3, 1913: Return of Richard L. Halsey.

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\*Page-number appearing at foot of page of original certified Record.

July 3, 1913: Motion for Discharge.

SERVICE OF PROCESS:

June 28, 1913: Writ issued and delivered to the United States Marshal for the District of Hawaii. Said writ afterwards returned into court with the following return by the said United States Marshal, to wit: "Received the within Petition, Order and Writ of Habeas Corpus this 28th day of June, A. D. 1913, and returned as executed this 28th day of June, A. D. 1913, by hand upon Richard L. Halsey, inspector in charge at the Port of Honolulu, by exhibiting to him the Original Petition, Order and Writ of *Habeas Corpus*, [2] and handing to and leaving with him a certified copy of same."

HEARINGS:

July 3, 1913: Hearing on Motion for Discharge.

The above hearing was had before the Honorable Sanford B. Dole, Judge of said Court.

DECISION:

July 3, 1913: Decision Allowing Motion for Discharge and Ordering Petitioner Released from Custody.

JUDGMENT:

July 5, 1913: Judgment filed and entered.

PETITION FOR APPEAL:

August 15, 1913: Petition for Appeal filed and Order Allowing Same Signed. [3]

United States of America,  
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the United States District Court for the District of Hawaii, do hereby



certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; the account of the proceedings showing the service of the writ herein; the time when judgment herein was rendered and the Judge rendering the same, in the matter of the Application of Tsunezo Kusano for a Writ of *Habeas Corpus*, Number 61, in the United States District Court for the District of Hawaii.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 3d day of September, A. D. 1913.

[Seal]

A. E. MURPHY,

Clerk, United States District Court, Territory of Hawaii. [4]

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*In the District Court of the United States, in and for the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO KUSANO for a writ of Habeas Corpus.

**Petition for Writ of Habeas Corpus.**

To the Honorable SANFORD B. DOLE, Judge of the District Court of the United States, in and for the District and Territory of Hawaii:

The undersigned, Tsunezo Kusano, at present detained in the Immigration Station, Honolulu, petitioner herein, respectfully shows unto your Honor:

**FIRST.**

That petitioner is a subject of the Empire of

Japan, and is now about thirty-four years of age.

### SECOND.

That petitioner first arrived in the Territory of Hawaii, in the month of January, 1899, and lived continuously in said Territory, first at Ewa, Island of Oahu, afterwards at Puunene, Island of Maui, and thereafter at Kihei, Island of Maui, until the 27th day of September, A. D. 1912, when petitioner went to Japan for a visit intending shortly to return to said Territory.

### THIRD.

That when petitioner returned to Japan as aforesaid, he left his wife, Sae Kusano, at Kihei aforesaid, where she is now residing; that it was never the intention of your petitioner to abandon his domicile in the Territory of Hawaii, but it was at all times his intention to return to Hawaii and go to Kihei where his work can be resumed by him.

### FOURTH.

That petitioner returned to Honolulu aboard the S. S. "Siberia" on the 26th day of May, A. D. 1913, and on or about the 29th day of May, 1913, was examined by a Board of Special Inquiry at Honolulu [5] aforesaid, and was denied a landing on the ground that he was suffering from a dangerous, contagious disease known as Trachoma; that at said examination, after testimony had been adduced, the following proceedings were had:

EDWIN FARMER (one of the members of the Board of Special Inquiry).—"I move that applicant be denied admission and returned to Japan on account of being certified by the examining surgeon as

afflicted with a dangerous, contagious disease.”

MERLEN J. MOORE (one of the members of the Board of Special Inquiry).—“I second the motion.”

HARRY B. BROWN (one of the members of the Board of Special Inquiry).—“It is so ordered.”

EDWIN FARMER.—“I am of the opinion that applicant is returning to an unrelinquished domicile in Hawaii, and would therefore be considered by the courts in this Judicial District as entitled to land although he is certified as afflicted with Trachoma. He has pursued his regular occupation in Hawaii, his family has been here, he has been absent only about seven months, and his trip to Japan was only a temporary one, and his family is still here.”

MERLEN J. MOORE.—“I am of the same opinion.”

HARRY B. BROWN.—“I concur.”

HARRY B. BROWN.—(To applicant.) “You have been denied admission and ordered returned to Japan by reason of the certificate of the *examining* that you are afflicted with Trachoma, a dangerous contagious disease. You cannot appeal on that question but you have the right of appeal on the question of domicile. The Board is of the opinion that you are a returning resident of Hawaii. Do you desire to give notice of appeal now, do you want time to consider, or will you waive your right of appeal? You have 48 hours in which to decide if you so desire.”

A. “I will give notice of appeal now.”

HARRY B. BROWN.—(To applicant.) “Should your appeal be dismissed [6] you will be returned

to Japan at the expense of the steamship company which brought you to Hawaii.

#### FIFTH.

That an appeal from the decision of the Board of Special Inquiry was duly taken to the Secretary of Commerce and Labor and as petitioner is informed and believes, and upon such information and belief, alleges and avers, was overruled.

#### SIXTH.

That petitioner is imprisoned, confined, and deprived of his liberty at the Immigration Station, Honolulu, by Richard L. Halsey, Esquire, Inspector of Immigration of said Port of Honolulu, as petitioner is informed and believes and upon such information and belief, alleges and avers, under the claim that petitioner is an alien immigrant, suffering from a dangerous contagious disease, to wit, Trachoma, and your petitioner is further informed and believes and so alleges the fact to be, that petitioner will be deported to Japan by said Richard L. Halsey, at an early date unless the relief prayed for be granted by this Honorable Court.

#### SEVENTH.

That said imprisonment, restraint and confinement is illegal in this, that your petitioner is not an alien immigrant, but is a domiciled alien, and as such, cannot be legally imprisoned as aforesaid under the laws of the United States of America.

WHEREFORE, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus* directed to said Richard L. Halsey, Immigration Inspector as aforesaid,



may issue in this behalf so that your petitioner may be brought before this Honorable Court to do, submit to and receive what the law may direct.

Dated Honolulu, June 26th, A. D. 1913.

(Sgd.) In Japanese (TSUNEZO KUSANO).

Witness to signature:

(Sgd.) F. K. MAKINO. [7]

United States of America,  
Territory of Hawaii,—ss.

Tsunezo Kusano, being first duly sworn, on oath deposes and says: That he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that said statements are true as he verily believes.

(Sgd.) In Japanese (TSUNEZO KUSANO).

Witness to signature:

(Sgd.) F. K. MAKINO.

Subscribed and sworn to by said Tsunezo Kusano before me and by me subscribed on this 27th day of June, A. D. 1913.

[Seal] (Sgd.) B. N. KAHALEPUNE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Let the writ issue as herein prayed, returnable before me on the 1st day of July, A. D. 1913.

Dated, Honolulu, T. H., June 26th, A. D. 1913.

(Sgd.) S. B. DOLE,  
Judge of the United States District Court, Territory  
of Hawaii.



*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Writ of Habeas Corpus.**

The United States of America to RICHARD L.  
HALSEY, Esquire, United States Immigration  
Inspector, at the Port of Honolulu, Territory of  
Hawaii.

WE COMMAND YOU that the body of Tsunezo  
Kusano, in your custody detained, as it is said, to-  
gether with the day and cause of his caption and de-  
tention, you safely have before the Honorable San-  
ford B. Dole, Judge of our District Court of the  
United States, in and for the District and Territory  
of Hawaii, on Tuesday, the 1st [8] day of July,  
A. D. 1913, at the hour of 10 o'clock A. M. of said  
day, to do and receive all and singular those things  
which said Judge shall then and there consider of  
him in this behalf; and have you then and there this  
writ.

Witness the Honorable SANFORD B. DOLE,  
Judge of the District Court of the United States, in  
and for the District and Territory of Hawaii, this  
28th day of June, A. D. 1913.

[Seal]

A. E. MURPHY,  
Clerk.

By (Sgd.) Wm. L. Rosa,  
Deputy Clerk.

**MARSHAL'S RETURN.**

Received the within Petition, Order and Writ of

*Habeas Corpus* this 28th day of June, A. D. 1913, and returned as executed this 28th day of June A. D. 1913, by hand upon Richard L. Halsey, Inspector in Charge at the Port of Honolulu, by exhibiting to him the Original Petition, Order and Writ of *Habeas Corpus*, and handing to and leaving with him a certified copy of same.

(Sgd.) E. R. HENDRY.

United States Marshal.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Petitioner for Writ of *Habeas Corpus*. Filed June 28, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [9]

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**[Order Allowing Motion for Discharge and Directing  
That Petitioner be Released from Custody, etc.]**

From the Minutes of the United States District Court, Vol. 8, Page 571, Thursday, July 3, 1913.

[Title of Court and Cause.]

On this day came Mr. J. Lightfoot, counsel for the above petitioner, and also came Mr. C. C. Bitting, Assistant United States District Attorney, on behalf of the respondent herein, and this cause was called for hearing. Thereupon Mr. Lightfoot filed a Motion for Discharge, whereupon due argument having been had on said motion by respective counsel, the said motion was by the Court allowed and the petitioner ordered released from custody. Thereupon Mr. Bitting having given notice of appeal, it was by the Court ordered that said petitioner furnish a

recognizance herein in the sum of \$250.00, pending said appeal. [10]

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**[Return of U. S. Immigration Inspector to Writ of Habeas Corpus.]**

*In the United States District Court for the Territory of Hawaii.*

In the Matter of the Application of TSUNEZO KUSANO for a writ of Habeas Corpus.

RETURN OF RICHARD L. HALSEY, UNITED STATES IMMIGRATION INSPECTOR, AT THE PORT OF HONOLULU, TERRITORY OF HAWAII, TO THE WRIT OF HABEAS CORPUS ISSUED IN THE ABOVE-ENTITLED MATTER.

COMES NOW RICHARD L. HALSEY, and by way of return to the writ of *habeas corpus* in this cause issued says:

First. That he now here produces the body of Tsunezo Kusano as by said writ he is commanded to do.

Second. He admits the allegations contained in paragraphs first, second, third, fourth and fifth of said petition.

Third. Respondent shows in answer to paragraphs sixth and seventh of said petition that the petitioner is restrained and held for deportation under the orders of the Secretary of Labor, by reason of the fact that the said petitioner is not a citizen of the United States but is alien thereto, and that upon his arrival at the port of Honolulu, in the

United States of America, and his application for entrance into the United States therefrom, it was found and certified by a duly qualified officer of the Public Health and Marine Hospital Service, that the said petitioner was afflicted with a dangerous, contagious disease, and that thereupon the petitioner was informed that if he so desired he could have hospital treatment for said disease under the provisions of rule 19 of the Department in such matters made and provided, and permission was granted him for such hospital treatment which petitioner refused to accept, that by reason of the provisions of law the decision of the Board of Special Inquiry, confirmed by the Secretary [11] of Labor and based upon the certificate of the examining medical officer, became, was and is final as to the petitioner.

WHEREFORE, your respondent prays that the writ of *habeas corpus* heretofore issued may be discharged with costs to the petitioner.

(Sgd.) RICHARD L. HALSEY,  
Immigration Inspector in Charge.

United States of America,  
Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn, according to law, deposes and says that he is the Richard L. Halsey who has made the return to the writ of *habeas corpus* in the above-entitled cause; that he has read the said return, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.



Subscribed and sworn to before me this 3d day of July, A. D. 1913.

(Sgd.) WM. L. ROSA,  
Deputy Clerk, United States District Court, Territory of Hawaii.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Return of Richard L. Halsey. Filed Jul. 3, 1913.  
A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa,  
Deputy. [12]

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*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Motion for Discharge of Petitioner.**

Now comes Tsunezo Kusano, petitioner above named, by J. Lightfoot, his attorney, and moves this Honorable Court for an order herein granting the discharge of said petitioner from custody.

This motion is based on the pleadings filed, and proceedings had in the above-entitled court and cause.

Dated Honolulu, July 2d, A. D. 1913.

(Sgd.) J. LIGHTFOOT,  
Attorney for Petitioner.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Motion for Discharge of Petitioner. Filed Jul. 3,  
1913. A. E. Murphy, Clerk. By (Sgd.) Wm. L.  
Rosa, Deputy Clerk. [13]



*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Recognizance.**

The United States of America,  
Territory and District of Hawaii,—ss.

Be it remembered, that on the 5th day of July, A. D. 1913, before me, Foster L. Davis, Deputy Clerk of the District Court of the United States within and for the Territory and District of Hawaii, duly appointed by said Court and duly qualified and acting as such Deputy Clerk, personally came Tsunezo Kusano, as principal, and M. Tsuchiyama and F. K. Makino, as sureties, and jointly and severally acknowledged themselves to owe to the United States of America the sum of Two Hundred and Fifty Dollars (\$250.00), to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION OF THIS RECOGNIZ-  
ANCE is such, that whereas, by the judgment of the above-entitled court in the above-entitled action dated July 5th, 1913, the above-named Tsunezo Kusano was ordered discharged from custody, subject to the taking of an appeal; and

WHEREAS, said Court, being advised that the above-entitled action will be removed to the Appellate Court by proper proceedings in that behalf, fur-

ther ordered that said Tsunezo Kusano give his recognizance with surety in the sum and amount of Two Hundred and Fifty Dollars (\$250.00) to answer the judgment of the Appellate Court, and that, upon the giving of such recognizance, said Tsunezo Kusano shall answer, abide by and render himself in execution of, and obey, all orders and judgment of the Appellate Court herein whether that Appellate Court be the United States Circuit Court of Appeals for the [14] Ninth Circuit, or the Supreme Court of the United States, and in all respects subject himself to whatever action may be taken in or by such Appellate Court, then this recognizance to be void; otherwise to remain in full force, virtue and effect.

(Sgd.) In Japanese,

Principal.

(Sgd.) M. TSUCHIYAMA,

Surety.

(Sgd.) F. K. MAKINO,

Surety.

Witness to signature in Japanese:

(Sgd.) WM. L. ROSA.

Taken and acknowledged before me the day and year first above written.

[Seal]

(Sgd.) F. L. DAVIS,

Deputy Clerk, United States District Court.

United States of America,

Territory and District of Hawaii,—ss.

M. Tsuchiyama and F. K. Makino, parties to the above bond, being duly sworn, do depose and say, each for himself, that he is worth the sum of Two Hundred and Fifty Dollars (\$250.00) over and above

his just debts, liabilities, and exemptions, and that his property is situate in said Territory and subject to execution.

(Sgd.) M. TSUCHIYAMA.

(Sgd.) F. K. MAKINO.

Subscribed in my presence and sworn to before me this 5th day of July, A. D. 1913.

[Seal] (Sgd.) F. L. DAVIS,

Deputy Clerk, United States District Court.

Approved as to form and as to sufficiency of sureties.

(Sgd.) C. C. BITTING,

Assistant United States District Attorney.

Approved:

\_\_\_\_\_,  
Judge.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Recognizance. Filed July 5th, 1913. A. E. Murphy,  
Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [15]

\_\_\_\_\_  
*In the District Court of the United States, in and for  
the District and Territory of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Judgment.**

At the regular April, A. D. 1913 Term, of the District Court of the United States, for the District and Territory of Hawaii, held in the courtroom of said court, in the City of Honolulu, District and Territory aforesaid, on Thursday, the 3d day of July, A. D.

1913, the above-entitled cause having been heard on the pleadings and arguments of counsel for the respective parties and due deliberation had thereon, the Court finds that the above-named petitioner, Tsunezo Kusano, is entitled to be discharged, subject to the taking of an appeal, in which case he may be released upon giving a recognizance with sureties in the sum of Two Hundred and Fifty Dollars (\$250.-00), to answer the judgment of the Appellate Court.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the above-named petitioner Tsunezo Kusano, be, and he is hereby discharged from custody herein, subject to the taking of an appeal.

And the Court being advised that the above-entitled action will be removed to the Appellate Court by proper proceedings to be had in that behalf,

It is hereby further ordered, adjudged and decreed that the above-named petitioner, Tsunezo Kusano, give his recognizance with surety in the sum of Two Hundred and Fifty Dollars to answer the judgment of the Appellate Court; and that upon the giving of such recognizance, the said petitioner, Tsunezo Kusano, be released from custody. [16]

Given, made and dated at Honolulu, Territory of Hawaii, this 5th day of July, A. D. 1913.

(Sgd.) SANFORD B. DOLE,

Judge.

O. K.—(Sgd.) C. C. B.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Judgment Entered in J. D., Book 2, at folio 427.

Filed Jul. 5, 1913. A. E. Murphy, Clerk. By  
(Sgd.) Wm. L. Rosa, Deputy Clerk. [17]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Petition for Appeal.**

To the Honorable SANFORD B. DOLE, Judge of  
the Above-entitled Court:

THE UNITED STATES OF AMERICA, by its  
attorney, C. C. BITTING, conceiving itself aggrieved  
by the order and judgment made and entered on the  
5th day of July, A. D. 1913, in the above-entitled pro-  
ceeding, does hereby appeal from the said order and  
judgment to the Circuit Court of Appeals for the  
Ninth Circuit, and files herewith its assignment of  
errors intended to be urged upon appeal, and it prays  
that its appeal may be allowed, and that a transcript  
of the record of all proceedings and papers upon  
which said order and judgment was made, duly  
authenticated, may be sent to the Circuit Court of  
Appeals for the Ninth Circuit of the United States.

Dated this 15th day of August, A. D. 1913.

(Sgd.) C. C. BITTING,

Assistant United States Attorney.

Received a copy of the above petition.

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By his Attorney,

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[18]



[Endorsed]: No. 61. (Title of Court and Cause.)  
Petition for Appeal. Filed Aug. 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [19]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Order Allowing Appeal.**

Upon application and motion of C. C. BITTING,  
Assistant United States Attorney for the Territory  
of Hawaii:

IT IS HEREBY ORDERED that the petition for  
appeal heretofore filed herein by the United States  
of America be, and the same is hereby granted; and  
that an appeal to the United States Circuit Court of  
Appeals for the Ninth Circuit from the final order  
and judgment heretofore, on July 5th, 1913, filed  
and entered herein, be and the same is hereby allowed,  
and that a transcript of the record of all proceedings  
and papers upon which said final order and judgment  
was made, duly certified and authenticated, be trans-  
mitted, under the hand and seal of the Clerk of this  
Court, to the United States Circuit Court of Appeals  
for the Ninth Judicial Circuit of the United States,  
at San Francisco, in the State of California.

Dated this 15th day of August, A. D. 1913.

(Sgd.) S. B. DOLE,  
Judge U. S. District Court.

Received a copy of the above order.

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By his Attorney,

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[20]

[Endorsed]: No. 61. (Title of Court and Cause.)  
Order Allowing Appeal. Filed Aug. 15, 1913. A.  
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [21]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Assignment of Errors.**

And now comes the United States of America, by  
C. C. BITTING, its attorney, and says that in the  
record and proceedings in the above-entitled matter  
there is a manifest error, and that the final record  
and judgment, made and entered in said matter on  
the fifth day of July, A. D. 1913, is erroneous and  
against the just rights of the said United States, in  
this, to wit:

First. That the Court erred in issuing the writ of  
*habeas corpus* as prayed for in the petition, the  
Court having no jurisdiction in the premises.

Second. That the applicant being afflicted with a  
dangerous, contagious disease, to wit, trachoma, and  
under the provisions of law, was properly denied ad-  
mission into the United States.

Third. That the applicant having denied and  
refused the leave granted him for hospital treatment

under the provisions and regulations of the Department of Labor, the Court was in error in permitting him to be landed and in sustaining the writ of *habeas corpus* issued in said cause. [22]

Dated this 15th day of August, A. D. 1913.

(Sgd.) C. C. BITTING,

Assistant United States Attorney.

Received a copy of the above assignment of errors.

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By his Attorney.

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[Endorsed]: No. 61. (Title of Court and Cause.)  
Assignment of Errors. Filed Aug. 15, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [23]

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*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Citation on Appeal.**

United States of America,—ss.

The President of the United States, to Tsunezo  
Kusano, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the Clerk's office of the United States District Court for the

Territory of Hawaii, wherein the United States of America is appellant, and you, Tsunezo Kusano, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf. [24]

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 15th day of August, A. D. 1913, and of the Independence of the United States the one hundred and thirty-eighth.

S. B. DOLE,

Judge U. S. District Court, District of Hawaii.

[Seal]

Attest: A. E. MURPHY,

Clerk U. S. District Court.

Received a copy of within citation.

\_\_\_\_\_,  
By his Attorney:

\_\_\_\_\_.  
[Endorsed]: No. 61. (Title of Court and Cause.)  
Citation on Appeal. Filed August 15, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [25]

*In the United States District Court for the Territory  
of Hawaii.*

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

**Praecipe for Transcript.**

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition for writ of *habeas corpus* and writ, filed June 28, 1913.
2. Return of Richard L. Halsey, filed July 3, 1913.
3. Motion for discharge of petitioner, filed July 3, 1913.
4. Recognizance, filed July 5, 1913.
5. Judgment, filed July 5, 1913.
6. Petition for appeal, filed \_\_\_\_\_.
7. Assignment of errors, filed \_\_\_\_\_.
8. Order allowing appeal, filed \_\_\_\_\_.
9. Citation, filed \_\_\_\_\_.
10. All minute entries in above-entitled cause.
11. This praecipe. [26]

Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, before



the 15th day of September, A. D. 1913.

THE UNITED STATES OF AMERICA,

By (Sgd.) C. C. BITTING,

Assistant United States Attorney.

[Endorsed]: No. 61. (Title of Court and Cause.)  
Praecipe for Transcript. Filed Aug. 8, 1913. A. E.  
Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy  
Clerk. [27]

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**[Certificate of Clerk U. S. District Court to Tran-  
script of Record, etc.]**

*In the United States District Court in and for the  
District and Territory of Hawaii.*

No. 61.

In the Matter of the Application of TSUNEZO  
KUSANO for a Writ of Habeas Corpus.

United States of America,  
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the District Court of the  
United States for the District of Hawaii, do hereby  
certify the foregoing pages, numbered from 1 to 28,  
inclusive, to be a true and complete transcript of the  
record and proceedings had in said court in the Mat-  
ter of the Application of Tsunezo Kusano for a Writ  
of *Habeas Corpus*, as the same remains of record and  
on file in my office, and I further certify that I here-  
unto annex the original Citation on Appeal in said  
cause.

I further certify that the cost of the foregoing  
transcript of record is \$6.90, and that said amount

has been charged by me in my account against the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 3d day of September, A. D. 1913.

[Seal] A. E. MURPHY,  
Clerk, United States District Court, Territory of  
Hawaii. [28]

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[Endorsed]: No. 2319. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Tsunezo Kusano, Appellee. In the Matter of the Application of Tsunezo Kusano for a Writ of *Habeas Corpus*. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Received and filed September 15, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

**UNITED STATES CIRCUIT COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	
vs.	
TSUNEZO KUSANO,	<i>Appellee.</i>

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**IN THE MATTER OF THE APPLICATION OF  
TSUNEZO KUSANO FOR A WRIT OF HABEAS  
CORPUS.**

**BRIEF OF APPELLANT**

**Upon Appeal from the United States District Court for  
the Territory of Hawaii.**

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**STATEMENT OF THE CASE.**

This is an appeal on the part of the government from a judgment of the District Court of the United States in and for the District of Hawaii discharging upon a writ of *habeas corpus* the said Tsunezo Kusano. The District Court of Hawaii evidently determined the case upon the pleadings.

The petition for the writ of *habeas corpus* sets

forth that the petitioner is a subject of the Emperor of Japan; that he arrived in Hawaii first in the month of January, 1899, and lived there continuously until the 27th day of September, 1912, when petitioner went to Japan for a visit; that when he returned to Japan he left in Hawaii a wife, who is now residing in Hawaii; that he returned to Honolulu on the steamship "Siberia" on the 26th of May, 1913, and being examined by a Board of Special Inquiry, was denied a landing on the ground that he was suffering from a dangerous, contagious disease known as trachoma. He sets forth the proceedings of the Board of Special Inquiry in which they denied him a landing on the ground that he is afflicted with trachoma; they held that he is domiciled in Hawaii under the decisions of the Judicial District and that he has not relinquished his domicile in Hawaii according to the view of the law held by the Courts of the Judicial District of Hawaii; that he appealed from the decision of the Board of Special Inquiry to the Secretary of Commerce and Labor, which appeal was overruled; and that one Richard L. Halsey, Inspector of Immigration, will deport petitioner to Japan unless relief is granted by the Court. A further allegation is made that the petitioner is not an alien immigrant but is a domiciled alien and as such cannot be legally imprisoned under the laws of the United States.

The return of the Immigration Inspector sets forth that he is holding the alien under orders of the Secretary of Labor for deportation by reason of the fact that the petitioner is not a citizen of the United

States but an alien and that upon his arrival at Honolulu and his application for entrance into the United States it was found and certified by a duly qualified officer of the Public Health and Marine Hospital Service that the alien was afflicted with a dangerous, contagious disease and that if he so desired he could have hospital treatment for said disease under the provisions of rule 19 of the Department and permission was granted him for such hospital treatment which petitioner refused and that by reason of the provisions of law the decision of the Board of Special Inquiry, confirmed by the Secretary of Labor and based upon the certificate of the examining medical officer, became, was and is final as to the petitioner.

The attorney for the petitioner thereupon moved to have the petitioner discharged, basing said motion upon the pleadings, whereupon the Court gave its judgment discharging the petitioner.

### THE LAW OF THE CASE.

The respondent contends that the order of the Court below discharging the petitioner on a writ of *habeas corpus* should be reversed and the petitioner remanded to the custody of the immigration authorities for deportation, on two grounds:

FIRST: THAT THE COURT HAD NO JURISDICTION TO ENTERTAIN THE PETITION UNDER THE ALLEGATIONS OF THE PETITION AND THE EVIDENCE PRESENTED.

SECOND: THAT UPON THE EVIDENCE PRESENTED TO THE BOARD OF SPECIAL INQUIRY ITS ORDER EXCLUDING



THE ALIEN FROM ADMISSION TO THE UNITED STATES  
WAS PROPER.

Under the first heading it will be observed that there is no allegation in the petition alleging the setting forth of a denial of a fair hearing to the petitioner on the part of the Board of Special Inquiry or the Secretary of Labor. Such being the case, the matter is governed by the decision of the *United States vs. Ju Toy*, 198 U. S. 253, 40 L. Ed. 1040.

"We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of *United State vs. SingTuck*, 194 U. S. 161, 48 L. Ed. 917, 921, 24 Sup. Ct. Rep. 621: 'A petition for *habeas corpus* ought not to be entertained unless the Court is satisfied that the petitioner can make out at least a *prima facie* case.' This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence, or allege its effect."

The finding of the Secretary of Labor that the alien is not domiciled in the United States is conclusive upon the alien.

*United States vs. Ju Toy*, 198 U. S. 1043;  
*United States vs. Sing Tuck*, 194 U. S. 168, 48  
L. Ed. 917;  
*United States vs. Chin Low*, 208 U. S. 8, 52 L.  
Ed. 369;  
*Ecker vs. United States*, 142 U. S. 651;  
*How Moy vs. North*, 183 Fed. 89.

The basis for jurisdiction for the issuance of a writ of *habeas corpus* by the District Court is

based entirely upon the question as to whether or not the alien has been given a fair hearing by the immigration authorities.

*United States vs. Chin Yow, supra.*

"Of course, if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing the case can proceed no further. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. \* \* \*

"We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce; or rule 7, commented on in *United States vs. Sing Tuck*, 194 U. S. 161, 169, 170, 48 L. Ed. 917, 921, 24 Sup. Ct. Rep. 621, as giving them some control or choice as to the witnesses to be heard. But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

In this case there is no allegation or proof whatsoever tending to show that the alien was not given a fair hearing in this matter, and the Secretary's ruling

must prevail. The allegation that he is a domiciled alien does not take his case out from under the reasoning of those cases, for in each of the cases I have cited the alien claimed to be a citizen of the United States. With much stronger force would the same reasoning apply to the alien claiming domicile.

The reasoning in these cases is not confined to the Chinese Exclusion Act, but is likewise applicable to cases arising under the Immigration Act.

*United States vs. Low Wah Suey*, 225 U. S. 460.

The terms of the Immigration Act under which this alien was ordered deported provides:

"Sec. 6. That the decision of the Board of Special Inquiry hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to rejection of aliens afflicted with tuberculosis or with a loathsome or dangerous, contagious disease or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission into the United States under section 2 of this Act."

Section 25 is the matter referred to in section 10, which section, after providing for the appointment of boards of special inquiry, is as follows:

"Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before boards shall be separate and apart from the public, but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decision of any two members

of a board shall prevail, but either the alien or any dissenting member of the said board may appeal through the Commissioner of Immigration at the port of arrival and the Commissioner-General of Immigration to the Secretary of Commerce and Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the Commissioner of Immigration at the port of arrival of such decision, which shall be rendered solely upon the evidence adduced before the Board of Special Inquiry; *provided*, that in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor; but nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this Act."

It thus appears that the order of the Board of Special Inquiry excluding the alien, based upon the medical certificate that the alien was suffering with a dangerous, contagious disease, is final and the Court has no power nor authority to review its decision.

The contention of the alien that he domiciled in the United States and therefore not subject to the immigration laws has been decided adversely by the Supreme Court.

*Anna Lapina vs. William Williams*, Commissioner of Immigration, opinion by Justice Whitney, rendered January 5, 1914. Advance Sheets Lawyers' Edition, Feb. 14, 1914, page 196.



The transcript (Tr. ) affirmatively shows that the alien was offered hospital treatment and refused the same, thereby not complying with Immigration rule 19 for the admission of aliens. Not having exhausted his remedy in the department, he is not entitled to apply to the courts.

*United States vs. Sing Tuck*, 194 U. S. 168;  
*United States vs. Jew Toy*, 198 U. S. 1043;  
*Eiku vs. United States*, 142 U. S. 651.

SECOND: THAT UPON THE EVIDENCE PRESENTED TO THE BOARD OF SPECIAL INQUIRY ITS ORDER EXCLUDING THE ALIEN FROM ADMISSION TO THE UNITED STATES WAS PROPER.

Without waiving in any way the position hereinbefore taken, we contend that the alien should be deported on the record made out before the Board of Special Inquiry. The alien although domiciled in the United States, when he has left the same and presents himself for readmission to the United States is in the same position as any other alien who may never have been in the United States before.

*Anna Lapina vs. William Williams*, Commissioner of Immigration, Advance Sheets Lawyers' Edition, Feb. 1, 1914, page 196.

The alien was suffering from a loathesome, dangerous, contagious disease, to wit, trachoma, as is shown by the medical certificate of Dr. Trotter of the Public Health and Marine Hospital Service at Honolulu and having refused medical treatment offered him under rule 19, of the Immigration Rules and Regula-



tions, is subject to deportation and should be refused admission under sections 2, 10 and 25 of the Immigration Act, which excluded aliens afflicted with tuberculosis or with a loathsome or dangerous contagious disease.

We contend that this case should be reversed and the alien remanded to the custody of the Immigration Inspector for deportation.

Respectfully submitted,

JOHN W. PRESTON,  
United States Attorney,

EARL H. PIER,  
Special Assistant to United States Attorney,  
Attorneys for Appellant.



No. 2334

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION  
COMPANY, a Corporation,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Idaho, Eastern Division.

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FILED

OCT 4 - 1913



No. 2334

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Plaintiff in Error,  
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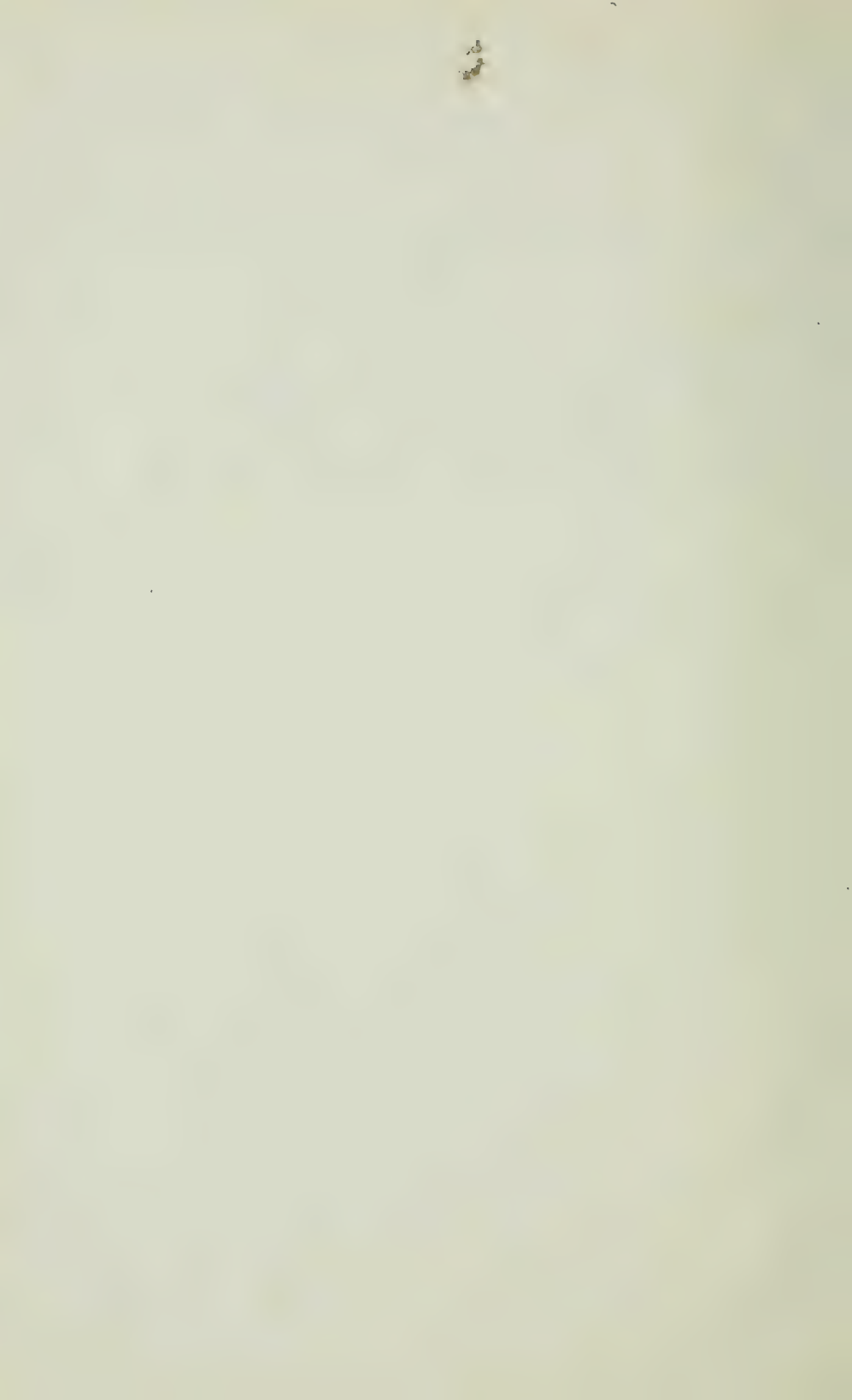


# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

#149—AT LAW.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGA-  
TION COMPANY, a Corporation,

Defendant.

**Complaint.**

Comes now the United States of America by C. H. Lingenfelter, United States Attorney for the District of Idaho, acting in its behalf by direction of the Attorney General of the United States, and brings this suit and complains and alleges:

1.

That the plaintiff was at all times hereinafter mentioned the owner of Sections Ten and Eleven (10 and 11) Township six (6) South, Range Thirty-eight (38) East, Boise Meridian, which said lands are by treaty reserved for the use of the Bannock and Shoshone tribes of Indians.

2.

That the aforesaid Sections Ten and Eleven (10 and 11) were at all the times hereinafter mentioned, and are now, a part and portion of the Fort Hall Indian Reservation, Bannock County, State of Idaho.

3.

That the defendant, the Portneuf-Marsh Valley Irrigation Company, is now and was at all times

hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of Idaho, [1\*] and as such corporation doing business in Idaho under the corporate name of the Portneuf-Marsh Valley Irrigation Company.

## 4.

That the aforesaid defendant corporation was formed for the purpose of irrigating arid lands in the State of Idaho, which said arid lands were adjacent to the said Fort Hall Indian Reservation.

## 5.

That on or about the 1st day of January, 1908, the defendant company, under an act of Congress of March 3, 1891, made an application to the Secretary of the Interior for a right of way over a portion of the aforesaid Sections Ten and Eleven (10 and 11) for reservoir purposes.

## 6.

That on the 27th day of June, 1908, the aforesaid application of said defendant company was approved by the Secretary of the Interior.

## 7.

That under and by virtue of said application and the approval thereof by the said Secretary of the Interior, the defendant company entered upon a portion of the lands aforesaid, to wit: Sections Ten and Eleven (10 and 11), and appropriated the said lands to its exclusive use and benefit, and constructed its reservoir thereon, and has impounded within said reservoir a large body of water to be used in irrigating certain arid lands adjoining the said Fort Hall Indian Reservation.

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\*Page-number appearing at foot of page of original certified Record.



8.

That the quantity of lands so appropriated by the defendant company to its exclusive use and benefit included in said reservoir and submerged under water, [2] by virtue of its said application and approval thereof, is approximately 246.13 acres; that said 246.13 acres of land are a part and portion of the aforesaid Sections Ten and Eleven (10 and 11), and particularly described as follows, to wit:

Beginning at a point on the reservation line N. 89 degrees 56 minutes E. 567.8 ft. from the S.  $\frac{1}{4}$  corner of Sec. 11, Tp. 6 S. R. 38 E. of the Boise Meridian; thence N. 11 degrees 08 minutes W. 7.1 ft.; thence N. 26 degrees 45 minutes E. 355 ft.; thence N. 55 degrees 33 minutes E. 862.9 ft.; thence N. 22 degrees 42 minutes W. 559.1 ft.; thence N. 24 degrees 49 minutes W. 1146.7 ft.; thence N. 49 degrees 13 minutes W. 984.2 ft.; thence N. 70 degrees 17 minutes W. 1091.2 ft.; thence N. 67 degrees 37 minutes W. 1400 ft.; thence S. 7 degrees 44 minutes W. 120 ft.; thence S. 35 degrees 08 minutes W. 168 ft.; thence N. 67 degrees 45 minutes W. 280 ft.; thence N. 67 degrees 45 minutes W. 280 ft.; thence S. 3 degrees 07 minutes E. 601 ft.; thence S. 13 degrees 15 minutes W. 268 ft.; thence S. 44 degrees 52 minutes E. 842.6 ft.; thence S. 26 degrees 11 minutes E. 160.3 ft.; thence S. 13 degrees 46 minutes W. 393.1 ft.; thence S. 7 degrees 06 minutes E. 692.2 ft.; thence S. 2 degrees 48 minutes W. 841.5 ft.; thence S. 6 degrees 36 minutes E. 256.3 ft.; thence N. 89 degrees 56 minutes E. 2649.3 ft.; to the place of beginning con-

taining 246.13 acres more or less.

9.

That the defendant claims the title, use and possession of said 246.13 acres of land only under and by virtue of the approval by the Secretary of the Interior of its application for a right of way for reservoir purposes under said Act of Congress of March 3, 1891.

10.

That the lands so appropriated and submerged by the said defendant company in said reservoir at the time of said appropriation were of the reasonable value of Ten Dollars (\$10.00) per acre.

11.

That the defendant company has not paid and refuses to pay for any of the said 246.13 acres of land so appropriated and submerged by it under the waters in said reservoir. [3]

12.

That by reason of the defendant company appropriating and submerging the aforesaid 246.13 acres of land, the plaintiff has been damaged in the sum of Two Thousand Four Hundred Sixty-one Dollars and Thirty Cents (\$2,461.30).

WHEREFORE, the plaintiff prays, judgment against the defendant in the sum of Two Thousand Four Hundred Sixty-one Dollars and Thirty Cents (\$2,461.30), and the costs of suit.

(Signed) S. L. TIPTON,  
Asst. U. S. Atty.

C. H. LINGENFELTER,  
United States Attorney for the District of Idaho,  
Residing at Boise, Idaho.

State of Idaho,  
County of Ada,—ss.

C. H. Lingenfelter, being first duly sworn, on oath deposes and says that he is the United States Attorney for the District of Idaho and Attorney for the plaintiff; that he makes this affidavit for and on behalf of the United States of America; that he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

(Signed)    C. H. LINGENFELTER.

Subscribed and sworn to before me this 29 day of July, 1912.

[Seal]

A. L. RICHARDSON,  
Clerk of United States District Court.

[Endorsed]: Filed July 29, 1912.    A. L. Richardson, Clerk.    [4]

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*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a Corporation,  
Defendant.

**Demurrer.**

Comes now the defendant and demurs to plaintiff's complaint filed in the above-entitled action, and for grounds of demurrer alleges:

## 1.

That said complaint does not state facts sufficient to constitute a cause of action.

(Signed) EDWIN SNOW,  
Attorney for Defendant.

Service accepted this 1st day of August, 1912.

(Signed) S. L. TIPTON,  
Assistant U. S. Attorney.

[Endorsed]: Filed August 1, 1912. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy. [5]

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*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a Corporation,  
Defendant.

**Stipulation [That Issues Arising on Demurrer may  
be Submitted on Briefs, etc.].**

IT IS HEREBY STIPULATED by and between C. H. Lingenfelter, United States Attorney for the District of Idaho, on behalf of the plaintiff, and Edwin Snow, on behalf of the defendant herein, that the issues arising on the demurrer to the plaintiff's complaint herein may be submitted on brief, without argument, the defendant to have twenty days from this date for the submission of its brief on demurrer, and the plaintiff to have ten days thereafter

within which to file reply brief.

Dated April 19, 1913.

C. H. LINGENFELTER,  
Attorney for Plaintiff.

EDWIN SNOW,  
Attorney for Defendant.

[Endorsed]: Filed April 19, 1913. A. L. Richardson, Clerk. [6]

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*In the District Court of the United States for the  
District of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a Corporation,  
Defendant.

**Opinion on Demurrer.**

May 23, 1913.

C. H. LINGENFELTER, U. S. Attorney, Attorney  
for Plaintiff.

EDWIN SNOW, Attorney for Defendant.

DIETRICH, District Judge:

This is an action at law brought by the plaintiff to recover from the defendant \$2,461.30, the alleged value of two hundred and forty-six and thirteen one hundredths acres of land on the Fort Hall Indian reservation in Southern Idaho. The facts exhibited by the complaint are, in substance, that the defendant is a corporation engaged in constructing an irrigating system for the irrigation of lands adjacent to



the reservation, a public use, and that, being in need of a reservoir site, on June 27, 1908, it made application to the Secretary of the Interior for the privilege of occupying the lands in question for such purpose. In due time the application was approved, and thereupon it constructed its reservoir.

The action is brought upon the assumption that [7] the Secretary of the Interior had no authority in law to make such a grant, and therefore his approval of the application was without jurisdiction and of no effect. In a case where a corporation engaged in a public service, and having the right or eminent domain, wrongfully enters upon lands required for its purpose without first compensating the owner, the latter may waive the tort and sue, as upon an implied contract, for the value of the land taken; and in such case the judgment, together with the satisfaction thereof, operates to effect a grant for such public use. Doubtless this rule is here relied upon by the plaintiff as a warrant both for the form of the action and the relief sought. But aside from the general merits of the controversy, there is, under the circumstances, an apparently insurmountable objection to the maintenance of such an action. If, as is argued by counsel for the Government in support of its contention, the right of occupancy of these lands as a part of the Fort Hall Indian reservation is guaranteed to the Indians by treaty stipulation and by act of Congress, and there is no law authorizing the Secretary of the Interior to grant to the defendant the privilege of using them for reservoir purposes, then admittedly no authority exists in the Executive to convey to, or confer upon,

the defendant any such right. Surely the Department at whose instance the suit is brought, and under whose direction it is being prosecuted, has no greater authority to divest the Indians of their right of possession, or to alienate the title of the Government, than has the Department of the Interior; and without statutory authority the court has no power indirectly to accomplish such an end. In that view, if the suit be prosecuted to judgment and the defendant pays the full amount claimed, what rights does it acquire? If, as is contended, the approval of [8] the Secretary of the Interior is without efficacy, what protection would such a judicial record afford to it if subsequently the Interior Department, charged with the duty of protecting the Indians and vindicating their rights, should demand that the lands be vacated? According to the plaintiff's contention, in Congress alone rests the power to dispose of the lands, and Congress has not authorized any disposition thereof, either by direct sale or indirectly through the operation of a judicial decree. For these reasons alone it must be held that the action cannot be maintained.

But also upon the merits it is thought that the demurrer is well taken. In approving the defendant's application the Secretary of the Interior doubtless assumed to act under Sections 18 and 19 of the act of March 3, 1891 (26 Stat. 1101), entitled, "An Act to repeal Timber Culture laws, and for other purposes," by which a "right of way through the public lands and reservations of the United States" is granted to any canal or ditch company formed for the purpose of irrigation, and complying with its

requirements, "to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof." It is further provided that no such right of way shall "be so located as to interfere with the proper occupation by the Government of any such reservation," and further that all maps of location shall be subject to the approval of the Department having jurisdiction of such reservation. Section 19 prescribes the manner in which the canal company must proceed in order to acquire the right. Unquestionably if at the time the defendant made its application, the Secretary had any authority whatsoever to approve the [9] application of any canal company for a right of way upon an Indian reservation under any circumstances, or upon any conditions, the propriety or wisdom of his approval cannot now be called into question. If we assume that he had jurisdiction to entertain such application, admittedly his action thereon was conclusive, and is not subject to collateral inquiry; and the only question therefore is one of jurisdiction.

It is not altogether clear from the plaintiff's brief whether it contends that by the act of March 3, 1891, no such authority ever was conferred upon the Secretary of the Interior, or only that in so far as that act purports to confer the authority it has been repealed. That the authority was originally conferred I have no doubt. When the act was passed it must have been contemplated that its application would be largely, if not entirely, confined to the western States, and the "Reservations" most prominently in mind must have been Indian reservations, for

they were at the same time numerous and the most extensive reservations in the west. That an Indian reservation is a "reservation of the United States" admits of little doubt. *L. L. & G. R. Co. vs. U. S.*, 92 U. S. 733; *M. K. & T. R. Co. vs. Roberts*, 152 U. S. 114; *In re Rio Verde Canal Co.*, 27 L. D. 421. In this last case Mr. Secretary Bliss advisedly held the statute to be applicable to Indian reservations, and very, persuasively states the reasons for such conclusion. It is pointed out that there is no apparent reason why an Indian reservation should not be subject to the grant of a right of way the same as any other reservation, especially in view of the fact that the Executive Department having jurisdiction thereof may determine whether a right of way can be granted without injury to the general purpose of the reservation, [10] and extend or withhold approval accordingly.

The principal contention seems to be that this provision of the act of March 3, 1891, was, by necessary implication, repealed by an act of May 11, 1898 (30 Stat. 404), amending an act approved January 21, 1895, entitled "An Act to permit the use of a right of way through the Public Lands for tramroads, canals, and reservoirs, and for other purposes" (28 Stat. 635), which in turn seems to be an amplification of Section 2339 of the Revised Statutes of the United States, granting rights of way for the construction of ditches and canals used in carrying on mining operations. The section is embraced in Chapter 6, entitled, "Mineral Lands and Mining Resources." The act of January 21, 1895, provides:



“That the Secretary of the Interior be, and he hereby is, authorized and empowered under general regulations to be fixed by him to permit the use of the right of way through public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, *by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying, or of cutting timber and manufacturing timber.*” It will thus be seen that the scope of this grant is entirely distinct from that of the grant of March 3, 1891, which pertains exclusively to the subject of irrigation, while this act has to do only with mining and quarrying, and with the lumbering industry. The act of May 11, 1898, amends the act of 1895 by adding thereto two paragraphs, the first of which simply provides that, [11] in addition to mining, quarrying, and lumbering, the tramways, canals or reservoirs for which rights of way may be appropriated, may be used for “the purpose of furnishing water for domestic, public, and other beneficial uses.” It is doubtless true that this language is broad enough to include the use to which water was to be applied under the act of March 3, 1891, but it is clear beyond peradventure that it was not intended thereby to repeal the earlier act, because in the succeeding paragraph it is declared “that the rights of way for ditches, canals



or reservoirs heretofore or hereafter approved under the provisions of Sections 18, 19, 20 and 21 "of the act of March 3, 1891, "may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation." Here is an express recognition of the fact not only that rights of way for ditches and canals had theretofore been approved under the earlier act, but that they might thereafter be approved, and surely there could be no subsequent approval if at the time it was intended that the act conferring the authority to approve should then and there stand repealed. Instead of an intention to repeal the act of March 3, 1891, it was clearly the purpose of Congress to leave it intact, and to supplement and enlarge its scope by providing that the canals constructed in accordance with its provisions might be used not only for furnishing water for irrigation purposes, but also for other purposes of a public nature, such as transportation and power, so long as such purposes were subsidiary to the main purpose of irrigation.

The argument that the granting of such rights of [12] way upon reservation lands operates as an injustice to the Indians is based upon an assumption of conditions which do not necessarily exist. The construction of an irrigation system in part upon reservation lands may or may not diminish the value of the reservation as a whole. Conditions may be readily imagined where the value would be enhanced rather than diminished. Presumably, and such

was doubtless the view of Congress, the Executive Department will not give its approval to an appropriation substantially prejudicial to the interests of the Indians, and here we are not advised of the conditions or terms upon which the Secretary endorsed his approval.

Accordingly the demurrer will be sustained and the complaint dismissed.

[Endorsed]: Filed May 23, 1913. A. L. Richardson, Clerk. [13]

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*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

#149—AT LAW.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY,

Defendant.

**Judgment.**

This cause came on regularly to be heard before the Hon. F. S. DIETRICH, judge of the above-entitled court, upon the demurrer of the defendant to the complaint of the plaintiff on file herein, oral argument having been expressly waived and the questions submitted on briefs, and after due deliberation thereon the Court sustained the demurrer to the complaint and rendered thereon an opinion in writing. Thereupon the plaintiff refusing to further

plead, it is ordered that the said complaint be dismissed.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said suit be dismissed and that the plaintiff have and recover nothing from the said defendant.

Judgment entered May 23, 1913. [14]

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*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION  
COMPANY,

Defendant.

**Petition for Appeal.**

To the Honorable F. S. DIETRICH, District Judge  
and Judge of the Above-named Court Presiding  
Therein:

Comes now the United States of America, plaintiff herein, and says that on or about the 23d day of May, 1913, this Court entered judgment herein in favor of the defendant in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

C. H. LINGENFELTER,  
Attorney for Plaintiff, and United States Attorney.

Received copy of foregoing this 7th day of October, 1913.

EDWIN SNOW,  
Attorney for Defendant.

[Endorsed]: Filed Oct. 7, 1913. A. L. Richardson,  
Clerk. [15]

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*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION  
COMPANY,

Defendant.

**Assignment of Errors.**

Now comes the plaintiff United States of America, by its attorney, and, as a part of its petition for a Writ of Error filed herein, makes the following assignment of errors which it avers were committed by the Court in the rendition of the judgment against this plaintiff appearing upon the record

herein. That is to say:

1.

The Court erred in holding and deciding that the complaint of the plaintiff did not state facts sufficient to constitute a cause of action against the defendant.

2.

The Court erred in sustaining the demurrer of the defendant to the complaint of the plaintiff.

3.

The Court erred in rendering judgment against the plaintiff upon the sustaining of the demurrer of the defendant.

4.

The Court erred in rendering judgment against this plaintiff, whereas judgment ought to have been rendered in favor of the plaintiff and against the defendant. [16]

Wherefore plaintiff prays that said judgment may be reversed.

C. H. LINGENFELTER,

United States Attorney, and Attorney for the Plaintiff.

Service of the above and foregoing Assignment of Errors is hereby acknowledged by receipt of a copy thereof this 7th day of October, 1913.

EDWIN SNOW,

Attorney for Defendant, Residing at Boise, Idaho.

[Endorsed]: Filed October 7, 1913. A. L. Richardson, Clerk. [17]



*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

#149—AT LAW.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION  
COMPANY,

Defendant.

**Order Allowing Writ of Error.**

This 7th day of October, 1913, came the plaintiff by its attorney, and filed herein and presented to the Court his petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

It is therefore ordered that the writ of error be allowed.

FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed October 8, 1913. A. L. Richardson, Clerk. [18]

*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

No. —.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION  
COMPANY,

Defendant in Error.

**Writ of Error.**

FROM THE CIRCUIT COURT OF APPEALS OF  
THE UNITED STATES FOR THE NINTH  
CIRCUIT TO THE DISTRICT COURT OF  
THE UNITED STATES FOR THE DISTRICT  
OF IDAHO.

United States of America,—ss.

The President of the United States of America to  
the Judge of the District Court of the United  
States for the District of Idaho, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment of a plea which is in  
the said District Court before you between the  
United States of America, plaintiff, and Portneuf-  
Marsh Valley Irrigation Company, defendant, a  
manifest error hath happened to the great damage  
of the said plaintiff, the United States of America,  
as is said and appears by the complaint. We being  
willing that such error, if any hath been, should be  
duly corrected and full and speedy justice done to  
the parties aforesaid in this behalf, do command

you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, [19] with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, together with this writ, so that you have the same at the said place before the justices aforesaid, on the 8th day of November, 1913, that the record and proceedings aforesaid, being inspected, the said justices of the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to law ought to be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, and the seal of your said Court, affixed at Boise, this 9th day of October, 1913.

[Seal]

A. L. RICHARDSON,

Clerk.

The foregoing writ is hereby allowed.

FRANK S. DIETRICH,

District Judge.

Service of the within and foregoing writ of error, together with a true copy thereof, accepted this 9th day of October, 1913.

EDWIN SNOW,

Attorney for Defendant, and Defendant in Error.

[20]

[Endorsed]: No. 149. In the District Court of the United States for the District of Idaho, Eastern Division. United States of America vs. Port-

*Portneuf-Marsh Valley Irrigation Company.* 21  
neuf-Marsh Valley Irrigation Company. Writ of  
Error. Filed Oct. 9, 1913. A. L. Richardson, Clerk.  
[20a]

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*In the District Court of the United States Within  
and for the District of Idaho, Eastern Division.*

#149—AT LAW.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION  
COMPANY,

Defendant.

**Citation.**

United States of America,—ss.

The President of the United States to Portneuf-  
Marsh Valley Irrigation Company and Edwin  
Snow Esq., Its Attorney, Greeting:

You are hereby cited and admonished to be and  
appear at the United States Circuit Court of Ap-  
peals for the Ninth Circuit to be held at the city of  
San Francisco in the State of California, within or  
on the 8th day of November, 1913, pursuant to a  
writ of error filed in the clerk's office of the District  
Court of the United States for the District of Idaho,  
Eastern Division, wherein the United States of  
America is plaintiff and you are defendant in error,  
to show cause, if any there be, why the judgment in  
said writ of error mentioned should not be corrected  
and speedy justice should not be done to the parties  
in this behalf.

Witness, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 7th day of October, A. D. 1913, and of [21] the Independence of the United States the one hundred thirty-seventh.

FRANK S. DIETRICH,  
United States District Judge, Presiding in the District Court.

[Seal]                      Attest: A. L. RICHARDSON,  
Clerk.

Service of the foregoing citation, and the receipt of a copy thereof, is hereby admitted this 9th day of October, 1913.

EDWIN SNOW,  
Attorney for Defendant and Defendant in Error.  
[22]

[Endorsed]: No. 149. In the District Court of the United States for the District of Idaho, Eastern Division. United States of America vs. Portneuf-Marsh Valley Irrigation Company. Citation. Filed Oct. 9, 1913. A. L. Richardson, Clerk. [22a]

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**Return to Writ of Error.**

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]                      A. L. RICHARDSON,  
Clerk. [23]



**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States, District  
of Idaho, Eastern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff in Error,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGA-  
TION COMPANY, a Corporation,  
Defendant in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages numbered from 1 to 24, inclusive, contain true and correct copies of the Complaint, Demurrer, Stipulation, Opinion on Demurrer, Judgment, Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Writ of Error, Citation, Return to Writ of Error, and Clerk's Certificate, which together constitute the transcript of the record and return to the annexed Writ of Error.

Witness my hand and the seal of said Court affixed this 25th day of October, 1913.

[Seal]

A. L. RICHARDSON,  
Clerk. [24]

[Endorsed]: No. 2334. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. Portneuf-Marsh Valley Irrigation Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Eastern Division.

Received October 28, 1913.

F. D. MONCKTON,  
Clerk.

Filed Oct. 28, 1913.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

2334  
No. 2234

19

IN THE  
UNITED STATES CIRCUIT COURT  
OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA, PLAINTIFF IN  
ERROR,

VS.

PORTNEUF-MARSH VALLEY IRRIGATION COM-  
PANY, A CORPORATION, DEFENDANTS  
IN ERROR.

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BRIEF OF PLAINTIFF IN ERROR.

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ERROR TO THE UNITED STATES CIRCUIT COURT, DISTRICT  
OF IDAHO.

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JAMES L. McCLEAR,  
*United States Attorney for the District of Idaho.*



No. 2234

IN THE  
UNITED STATES CIRCUIT COURT  
OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA, PLAINTIFF IN  
ERROR,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION COM-  
PANY, A CORPORATION, DEFENDANTS  
IN ERROR.

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BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF FACTS.

This cause reaches this Court by writ of error presented by the United States. The lower court rendered judgment in favor of the defendants on demurrer to the complaint. The Government refused to further plead, and advances as error three different grounds, all of which go to the question of law as to whether or not the complaint states facts sufficient to constitute a cause of action.

The action was brought to recover from the defendants



\$2461.30, the alleged value of 246.13 acres of land within the Fort Hall Indian Reservation in Idaho, appropriated by the defendant company in constructing an irrigation system for the irrigation of certain lands near the reservation.

On June 28th, 1908, the irrigation company made application to the Secretary of the Interior for a permit for such purposes which was thereafter duly approved by the Secretary in the usual manner in which such licenses are granted.

There is shown upon the face of the complaint the approval of the Secretary of the Interior, and that the company has constructed a reservoir and has impounded therein a large body of water to be used as stated in the irrigation of certain arid lands near the Fort Hall Indian Reservation, belonging to private parties.

The defendant in error, hereafter designated as the irrigation company, contends that it had the right to construct the reservoir, under authority granted by the Secretary of the Interior, pursuant to Act of Congress of March 3d, 1891, granting right of way for canals and reservoirs (Sec. 18 Act of March 3d, 1891, 26 Stat. 1101, 6 Fed. Stat. Annotated 508; Sec. 19 Act of March 3d, 1891, 26 Stat. 1102, 6 Fed. Stat. Annotated 509). The action was brought upon the theory that the Secretary of the Interior is without authority to grant such permit across the lands belonging to the Indians by virtue of a treaty hereinafter referred to, unless Congress by express statute has so authorized, and that the Act of March 3, 1891, does not bear out such construction, and that the acts of the irrigation company are without the sanction of law and the company should respond in damages for the reasonable value of the lands taken.

The Government maintains that the language used in the Act of March 3d, 1891, in Sec. 18 thereof, "that the right of way through the public lands and reservations of the

United States, is hereby granted" does not give the right of way for the purposes contended by the irrigation company across the Fort Hall Indian Reservation.

## BRIEF, POINTS AND AUTHORITIES.

### I.

That the Act of March 3d, 1891, has been superseded by a later act which by necessary implication repeals the Act of March 3d, 1891.

### II.

That the lands in question were segregated and taken out of the category of public lands by grant and treaty of agreements with the Bannock and Shoshone Indians concluded on the 3d day of July, 1868 (Vol. 15 Stat. L. 673).

### III.

Even though the Secretary had authority to grant the right of way under Act of March 3d, 1891, compensation should be allowed the Indians for the lands appropriated.

These propositions may be considered in the order named.

#### *Proposition 1.*

The repealing statute referred to was enacted by Congress May 11th, 1898, and is as follows:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Act entitled "An Act to permit the use of the right of way through the public lands for tram-roads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations

to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the center line of the tramroad, by any citizen, or association of citizens, of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

“Sec. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled ‘An Act to repeal timber culture laws, and for other purposes,’ approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.”

It will be observed that under the provisions of Section 2 of the Act of May 11th, 1898, reference is made to rights of way for canals or reservoirs for purposes of public nature, and said rights of way may be used for water transportation for domestic purposes or for the development of power as subsidiary to the main purpose of irrigation, and does not confer upon a private irrigation company, such as is now before the Court, the right of way across an Indian reservation, even with the approval of the Secretary of the Interior. Section 1 of the Act of May 11th, 1898, expressly states that the Secretary of the Interior is precluded from granting right of way within the limits of any park, forest, military or Indian reservation for canals, tramways or reservoirs. It is also noted that Sections 18, 19, 20 and 21 are from the Act of March 3, 1891: “An Act to repeal timber culture laws, and for other purposes,” which Act is referred to in Section 2 of the Act of May 11, 1898.

It was contended by the defendant in the lower court that the Act of February 15, 1901 (37 Stat. 790), which grants the right of way over public lands, reservations and public parks for electric lines, canals, tunnels, etc., is explanatory of the word "reservations" used in the Act of March 3, 1891. The proviso under Act of February 15, 1901, clearly refutes any such interpretation and uncontrovertably shows that the permission granted by the Secretary therein to be of a temporary character and revocable at will, and which proviso is as follows:

"And provided further: That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor at his direction, and shall not be held to confer any right or easement or interest in, to or over any public land, reservation or park."

It is also significant that the Act of March 3, 1875, which gives the right of way through public lands to railroads, that Section 5 thereof especially exempts Indian reservations from the grant, namely: "That this Act shall not apply to any lands within the limits of any military park or Indian reservation, or other lands especially reserved from sale unless such right of way shall be provided for by treaty, stipulation, or by Act of Congress heretofore passed" (18 Stat. 483).

### *Proposition 2.*

The treaty between the United States and the Bannock and Shoshone tribes of Indians, concluded on July 3, 1868, expressly confers upon said Indians the right to the absolute and undisturbed use and occupation of the lands included within the said reservation, and for other free tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them, and the United States solemnly agrees that no persons



except those therein designated and authorized therein to do so, and except such officers, agents and employes of the government as may be authorized to enter upon the Indian reservation in discharge of the duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article (being Article No. 2 of said treaty) for the use of said Indians, and henceforth, they will and do hereby relinquish all titles, claims or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid.

Article 6 of said treaty gives the right to any individual belonging to said tribes of Indians, the right to select 320 acres of land within the reservation of his tribe, which tract so selected, certified and recorded in the land book, shall cease to be held in common, but the same may be occupied and held to the exclusive possession of him or his family so long as he or his family may continue to cultivate it.

Article 6. "If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified and recorded in the 'land-book,' as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it. Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of



the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the 'Shoshone (eastern band) and Bannock land-book.' "

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and the descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper."

Article 11. "No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty."

It is conceded that the Secretary of the Interior is the custodian of the public lands, but, when withdrawn from entry and sale as are lands within an Indian reservation, and reserved to the exclusive use and benefit of the Indians for lands ceded to the Government, the Secretary can then only dispose of said lands as Congress may direct. That the Secretary of the Interior is merely an agent appointed by law to do certain acts and perform certain duties required by law and he has no power beyond those specified in the law which creates his office and defines his powers and duties. The treaty with the Fort Hall Indians gives them a vested right

in the lands so reserved, and any attempted transfer of any part of the lands secured by treaty, would be a gross breach of public faith, and the presumption is that Congress never intended to deprive them of the lands solemnly conveyed by treaty rights.

Leavenworth Railroad Company v. United States,  
92 U. S. 733; 23 L. Ed. 634.

The Court's attention is especially directed to the use of the language in the granting clause "That the right of way through the public lands and reservations of the United States is hereby granted, etc." It is noted that the reservations mentioned are in the possessive; that is, relate to reservations which belong to the United States such as military and park reservations, where the absolute and incontestable title remains in the United States, and was not intended by Congress to refer to lands held in trust by the United States for the Indians. Such an interpretation would be a breach of public faith towards a dependent and unlettered people to take from them their lands after a solemn and binding treaty agreement made long prior to the passage of the act in question. It is incongruous to say that an official of the land department can take from the grant 246.13 acres for the use of a private corporation to irrigate lands outside the limits of the reservation. If this reasoning is sound, the power and authority rests with the Secretary of the Interior to diminish the acreage of the reserve to such an extent as to defeat the purpose of the grant, and thus deprive each individual belonging to said tribes being the head of a family from selecting a tract within the reservation of his tribe not exceeding 320 acres in extent as provided in Article 6 of the treaty.

This court gave emphasis to the importance of the principles thus enumerated in the following pertinent language:

In the case of *Winters vs. United States*, 143 Fed. 748,

after quoting from Kinney on Irrigation, Section 124, the Courts say: "In the application of these principles to military reservations, see *Wilcox v. Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264. In *Leavenworth R. R. Co. v. United States*, 92 U. S. 733, 742, 745, 747, 23 L. Ed. 634, the court, in discussing the question whether certain lands granted to the railroad company conveyed lands which had previously been reserved for the Indians, said:

"As long ago as the *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the government; and recently, in *United States v. Cook*, 19 Wall. 591, 22 L. Ed. 210, that right was declared to be as sacred as the title of the United States to the fee. \* \* \* With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion, if the government discharged its duty to them. \* \* \* We are not without authority that the general words of this grant do not include an Indian reservation."

After quoting from *Wilcox v. Jackson*, *supra*, the court said that the rule therein announced "Applies with more force to Indian than to military reservations. The latter are the absolute property of the government. In the former other rights are vested. Congress cannot be supposed to grant them by a subsequent law general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose. \* \* \* The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein and had title thereto. In one sense they were reserved to the Indians; but, in another and broader sense, to the United States, for the use of the Indians. Every tract set apart for special uses is reserved to the government, to enable it to enforce them." In *United States v. Carpenter*, 111 U.S. 347, 349, 4 Sup. Ct. 435, 436, 28 L. Ed. 451, where the court held that the location of land scrip upon lands reserved for

Indians under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void, Mr. Justice Field, in delivering the opinion of the court, said:

“It matters not whether the land had been surveyed or not, the treaty was notice that a part of the quarry would be retained by the government, and that the whole might be, for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the Land Department.”

In *Missouri, etc. Ry. Co. v. Roberts*, 152 U. S. 114, 118, 14 Sup. Ct. 496, 498, 38 L. Ed. 377, the court, in discussing the general question, said: “It has always been held that the occupancy of land set apart by statute or treaty with them (the Indians) for their use cannot be disturbed by claimants under other grants of the government not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands. And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands.”

Where public lands were withdrawn from sale for the subsequent benefit of certain Indians the fact that the withdrawal was conditional upon the land being required for the purposes of the Indian treaty, and that the Indians were to have no rights in such lands until after legislation should invest them with legal title, did not destroy the effectiveness of the withdrawal.

United States vs. Grand Rapids & I. R. Co., 154 Fed. 136.

“The reservation clause employed in the grant in question has been attached to all railroad land grants since 1850. The words ‘public lands’ have been held to designate such land as is subject to sale or other disposition under the general laws, but not such as is reserved by competent author-



ity, for any purpose or in any manner, although no exception is made of it. *Leavenworth, etc., R. R. Co. v. United States*, 92 U. S. 733, 746, 749, 23 L. Ed. 634; *Williams v. Baker*, 17 Wall 144, 21 L. Ed. 561; *Newhall v. Sanger*, 92 U. S. 761, 763, 23 L. Ed. 769; *No. Pacific R. R. Co. v. Musser-Sauntry Co.*, 168 U. S. 609, 18 Sup. Ct. 205, 42 L. Ed. 596; *United States v. So. Pacific R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; *Northern Lumber Co. v. O'Brien*, 139 Fed. 614, 71 C. C. A. 598; *Id.*, 27 Sup. Ct. 249, 204 U. S. 190, 51 L. Ed. 438.

The provision in the granting act for indemnity in lieu of lands sold or pre-empted does not indicate an intention to grant any but public lands. *Leavenworth, etc. R. R. Co. v. United States*, *supra*. The fact that the withdrawal was conditional upon the land being required for the purposes of the treaty, and that the Indians were to have no rights in them until after legislation should invest them with the legal title, does not destroy the effectiveness of the withdrawal. *Wolcott v. Des Moines Co.*, 5 Wall. 681, 18 L. Ed. 689; *Wolsey v. Chapman*, 101 U. S. 755, 25 L. Ed. 915; *Williams v. Baker*, 17 Wall. 144, 21 L. Ed. 561; *Homestead Co. v. Valley R. R.*, 17 Wall. 153, 21 L. Ed. 622; *Wisconsin Central R. R. v. Forsythe*, *supra*; *Spencer v. McDougal*, *supra*; *No. Pacific R. R. Co. v. Musser-Sauntry Co.*, *supra*.

The construction put upon the grant by the Land Department, as not excepting lands reserved for Indian purposes, cannot legally prevail against a clearly correct legal interpretation. *Wilcox v. McConnell*, 13 Pet. 511, 10 L. Ed. 264; *Wisconsin Central R. R. Co. v. Forsythe*, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71, and cases there cited. If the views above expressed are correct, it results that the lands in question were in contemplation of law reserved from the grant of June 3, 1856, and did not legally pass thereunder."



If withdrawn lands do not apply to railroad grants, then there is a much more cogent reason that Indian reservations are not included within the Act of March 3, 1891. *Leavenworth L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Barton v. No. Pacific R. R. Co.* 145 U. S. 535, 36 L. Ed. 806; *No. Lumber Co. v. O'Brien*, 204 U. S. 190, 51 L. Ed. 438; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954; *U. S. v. Oregon Central Military Road Co.* 103 Fed. 554; *Buttz v. No. Pacific R. R. Co.* 119 U. S. 55, 30 L. Ed. 330; *Mount Nebo Reservation*, 13 L. D. 45; *No. Pacific R. R. Co. v. Maclay*, 26 L. D. 43.

We go further and say that whenever a tract of land shall have been once legally appropriated to any person, from that moment land thus appropriated becomes severed from the mass of the public lands, and that no subsequent law, proclamation or sale could be construed to embrace or operate upon it although no reservation were made of it. It applies with more force to Indian than to the military reservations. The latter are the absolute property of the Government. In Indian reservations other rights are vested. Congress cannot be supposed to grant them by subsequent law general in its terms. Specific language leaving no room for doubt as to legislative will is required for such a purpose. That land dedicated to the use of the Indians should, upon every principle of natural rights be carefully guarded by the Government and saved from a possible grant, is a principle which will command universal assent.

*Leavenworth R. R. Co. vs. United States*, 92 U. S. 723, 23 L. Ed. 634.

It is not deemed that Section 13 of the Act of June 25, 1910, militates against the position taken by the Government, as the authority therein given is to reserve from location, entry, sale, allotment or other appropriations any lands within any Indian reservation valuable for power or reser-

voir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress, etc." This section confers upon the Secretary of the Interior, in his discretion, a right to reserve lands within Indian Reservations for irrigation companies recognized by Congress, but makes no mention of authority to grant rights of way for ditches and canals as provided under the Act of March 3, 1891, for its purposes are different in the respects enumerated.

It is noted that application for right of way in the instant case was approved by the Secretary of the Interior June 27th, 1908, and therefore the Act of June 25, 1910, above referred to would not be germane as the power thus conferred upon the Secretary is subsequent to the appropriation of the land by the irrigation company.

A treaty is the highest form of law and its provisions should not be abrogated unless Congress in its wisdom has deemed it expedient for the public good to do so. *United States v. Carpenter*, 111 U. S. 347, 28 L. Ed. 451; *Spalding v. Chandler*, 116 U. S. 404, 40 L. Ed. 473.

The Act of September 1, 1888 (25 Stat. 452), was a ratification of an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation in the territory of Idaho for the purpose of a townsite, and for a grant of right of way through said reservation to the Utah and Northern Railroad Company for other purposes. The consideration paid for the right of way for the railroad was \$8.00 per acre. This agreement is referred to for the purpose of showing that there is no intention on the part of Congress to take from the Indians any of the lands within the reservation without proper authority so to do nor without just compensation.

The lower court's reasoning that the Department of Jus-

tice has no greater right than the Secretary of the Interior, is answered fully in the case of United States vs. Malle Lac Band, 229 U. S. 428, 57 L. Ed. 1299.

*Third Proposition.*

The number of acres granted by the United States to the Bannock and Shoshone Indians was limited by the terms of the treaty, and to hold that lands could be taken by the Secretary of the Interior, would be doing an injustice to the Indians and depriving them of the right guaranteed by the Constitution of the United States that private property cannot be taken for public use without just compensation, and a deprivation of an equal protection of the laws. In the well known case of Minnesota vs. Hitchcock, the court used the following language which bears upon the question of the right of compensation (185 U. S. 389, 46 L. Ed. 963):  
 "Whether this tract, which was known as the Red Lake Indian Reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly, the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the Government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional), the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time the Indian's right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." Buttz vs. No. Pacific R. R. Co., 119 U. S. 55, 30 L. Ed. 330; Cherokee Nation vs. Southern Kansas R. R. Co., 135 U. S. 641, 34 L. Ed. 295; New York Indians vs. U. S., 170 U. S. 1, 42 L. Ed. 927; U. S. v. Mille Lac Band, 229 U. S. 498, 57 L. Ed. 1299.

The treaty with the Indians should be construed in a way that would do exact justice to the Indians, 175 U. S. 1, 44 L. Ed. 49, *Jones vs. Meehan*:

“In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the same sense in which they would naturally be understood by the Indians.”

“The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as chief, Moose Dung the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or by Congress, or of the executive departments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty itself. *Jones v. Meehan*, 175 U. S. 1, 44 L. Ed. 49; *Wilson v. Wall*, 6 Wall. 83, 89, 18 L. Ed. 727, 729; *Reichart v. Felps*, 6 Wall. 160, 18 L. Ed. 849; *Smith v.*



Stevens, 10 Wall. 321, 327, 19 L. Ed. 933, 935; Holden v. Joy, 17 Wall, 211, 247, 21 L. Ed. 523, 535."

The lower court based its decision largely upon the case of Rio Verde Canal Co., 27 L. D. 422, opinion being rendered by Secretary Bliss, who overruled the case of Florida Mesa Ditch Co., 14 L. D. 265, and the decision of March 14, 1898, 26 L. D. 381. The reasoning of the Secretary is considered unsound, as it is said by him in the course of the opinion "The granting of the right of way over such territory is but the exercise of the right of eminent domain, which is not in violation with the treaty made with the Indians or of its obligations to reserve the lands for their sole use and benefit free from intrusion by others." If the Secretary is correct in his premise, then the element of compensation is lacking and the plaintiff in this case is entitled to recover the value of the lands thus appropriated. But is the Secretary exercising the power of eminent domain in granting right of way across lands reserved from sale or other disposition by the Government? The answer must be in the negative as the power of eminent domain guarantees the right of judicial inquiry before a court of one's peers, and is not exercised in a summary way. The legislature cannot fix the compensation or prescribe the rules for its computation. Lewis on Eminent Domain, Sec. 461.

Upon the other hand, if the Secretary is exercising the power of eminent domain, and has put the machinery in motion by permitting the irrigation company to appropriate the lands as set forth in the complaint, then there still remains the right of the plaintiff to compensation which must be determined judicially. The action instituted is for that purpose. Lewis on Eminent Domain, Sec. 461.

The Plaintiff in Error now adverts to another proposition, namely: Has the Government the right to recover damages if the Secretary of the Interior had no authority



to grant the permit for the construction of the reservoir site?

It will be conceded by the Defendant in Error, no doubt, that if the Secretary had no right to grant the permit, then the act was void and becomes *functus officio*, and no action upon the part of the Government will be required to cancel or revoke such permit. But the defendant in error, having already constructed the reservoir and impounded water therein, is liable and the plaintiff in error is entitled to compensation for the value of the lands unlawfully appropriated. Injunctive relief might have been obtained if the officers of the Government had been apprised in time of the commencement of construction upon the reservoir.

In law the unwarranted appropriation of land is equivalent to the taking of it and the defendant should be held to respond in damages to the Government, the custodian of the Indians, to the amount of the value of the land so taken. Angel, in his work on water courses, Section 465, says: "But there are numerous authorities sustaining the doctrine that a serious interruption to the common and necessary use of property may be equivalent to the taking of it, and that under the Constitutional provisions, it is not necessary that the land should be absolutely taken. Whenever there is actual physical invasion, compensation is due and the law then fixes the measure of that compensation to be the valuation of that part taken plus the damage to the remainder of the property resulting from such taking. *Louisville & Franklin Ry. Co. v. Brown*, 17 B. Monroe 763; *Hollister v. Union Co.*, 9 Conn. 436; *Sharp v. U. S.*, 191 U. S. 341.

It is conceded that the Government holds the lands in question in fee, but in trust for the Indians, and inasmuch as the Government is the proper party to institute the proceedings in behalf of the Indians, the compensation for the lands would be held by the Government in trust in lieu of the part of the lands so taken. In other words, the Indians

should receive compensation for their lands the same as a private individual should receive under like circumstances, under the principle that private property cannot be taken for public use without just compensation.

The trial Court erred in sustaining the demurrer of the defendant, and it is respectfully suggested that this Court should reverse the ruling, direct the trial court to try the case on its merits, and submit the question as to the value of the lands to a jury.

Respectfully submitted,

-JAMES L. McCLEAR,  
*United States Attorney.*

No. 2234

IN THE

UNITED STATES CIRCUIT COURT  
OF APPEALS

FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA, PLAINTIFF IN  
ERROR,

VS.

PORTNEUF-MARSH VALLEY IRRIGATION COM-  
PANY, A CORPORATION, DEFENDANTS  
IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

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ERROR TO THE UNITED STATES CIRCUIT COURT, DISTRICT  
OF IDAHO.

---

EDWIN SNOW,  
*Attorney for Defendant in Error.*



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STATEMENT OF FACTS.

The complaint alleges that the defendant is occupying, for the purposes of a reservoir for irrigation, certain lands on the Fort Hall Indian Reservation, under the authority of the Secretary of the Interior, pursuant to the act of Congress of March 3, 1891, granting rights of way for canals and reservoirs. It is shown on the face of the complaint that the approval of the Secretary of the Interior was duly given on June 27, 1908, and that the defendant company has constructed its reservoir and has impounded therein a large body of water to be used in irrigating certain arid lands in Bannock County, Idaho. As we understand it, the



government in this suit desires to question, by an action at law, instituted to recover damages for the use of this property, the authority of the Secretary of the Interior, under this act, to make a grant of right of way over an Indian reservation. To the complaint filed in the lower court defendant filed a general demurrer which was sustained. The government refused to plead further and the action was dismissed. The government appeals.

### ARGUMENT.

Section 18 of the act of March 3, 1891 (26 Stat. 1101, Vol. 6, Fed. Stat. Ann. p. 508), provides:

“That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals and fifty feet on each side of the marginal limits thereof; . . . Provided that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of waters for irrigation and other purposes under authority of the respective states or territories.”

Section 19 of the act provides:

“That any canal or ditch company desiring to secure the benefits of this act shall . . . file with the Register of the land office for the district where such land is located a map of its canal or ditch and reser-

voir and upon the approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. . . ."

Fed. Stat. Ann., Vol. 6, p. 509.

It is to be noted that the grant provided for in the act of Congress above recited is "over the public lands *and reservations* of the United States." The question to be determined, then, is whether an Indian reservation is "a reservation of the United States" within the meaning of the words as therein used.

"The term 'reservation,' as used with relation to the public lands, means a withdrawal of a specified portion of the public domain from the administration of the land office and from disposal under the land laws and the appropriation thereof for the time being to some particular use or purpose of the general government."

32 Cyc. 858.

Territory v. Burgess, 19 Pac. 558, 1 L. R. A. 808.

In the case of Leavenworth, Lawrence & Galveston Railroad Co. v. United States, 92 U. S. 733, at page 747, the court said:

"Every tract set apart for special uses is reserved to the government to enable it to enforce them. There is no difference in this respect whether it be appropriated for Indians or for other purposes."

In that case, it was contended that the exception in the statute under consideration was of lands reserved "to the United States," whereas, the lands in controversy were, in fact, reserved to the Osage Indians, but the court said:

"The verbal criticism that these lands were not within the meaning of the proviso, 'reserved to the

United States,' is unsound. In one sense they were reserved to the Indians but in another and broader sense to the United States for the use of the Indians."

In the Hot Springs cases, 92 U. S. 698, the court said that a reservation of lands for future disposal was a reservation "to the United States."

In the case of Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114, the court was considering a grant of lands and right of way to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway & Telegraph Co.

14 Stat. at L. p. 289.

The proviso with respect to the right of way was:

"Any and all lands reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purposes whatever were reserved and excepted from the operation of the act except so far as it might be found necessary to locate the route of said road through such reserved lands, in which case the right of way, 200 feet in width, is hereby granted subject to the approval of the President of the United States."

In construing the effect of this right of way grant, the court said:

"Certain lands within the present state of Kansas were reserved, while it was still a territory, and long previously by the United States for the use and occupation of the Osage Indians. Such reservation was made by treaty between them and the United States, concluded as far back as June 2, 1825, and proclaimed in December following. From that time and continuously thereafter, the reserved lands were occupied by the Indians until the treaty ceding the lands or parts thereof to the United States. . . . The United States had the authority to authorize the construction

of the road of the Missouri, Kansas & Texas Railway Company through the reservation of the Osage Indians and to grant absolutely the fee of the 200 feet as a right of way by the company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government."

From the foregoing, it is quite clear that the terms "lands reserved to the United States" or "public reservations" include Indian reservations.

The greater part of counsel's brief is taken up with the question whether or not Indian reservations are "public lands of the United States," and much authority is cited to sustain the negative of that proposition. Such argument and authority is superfluous on the part of the government. Defendant in error concedes at the outset that Indian reservations are not "public lands of the United States." But the significant feature is that the granting act by its terms operates not only upon the "public lands of the United States" but over the "reservations of the United States." The only question then is whether the term "reservation of the United States" includes Indian reservations. And from the very precise determination of that question by the Supreme Court of the United States in the two cases cited above, it is believed that the question is no longer debatable.

Indeed, when the time at which the act was passed and the purposes of the act are taken into consideration, it must be apparent that Indian reservations must have been what Congress had principally in mind in the use of the term "reservations of the United States." The grant was designed obviously to be applicable particularly to the arid west for the purpose of aiding in internal improvements. Since the government at that time had not inaugurated its forest reserve policy, the only other reservations to which it could have been applicable were military reservations.



Military reservations are generally small and compact areas, occupied by forts and barracks, over which there could, in the very nature of things, be no great necessity or opportunity for the construction of irrigation ditches and reservoirs. But since the Indian reservations that had been created by Congress were very generally situated in the arid west, were extensive in area and there were no provisions in the public land laws whereby irrigation companies could procure the right of way for canals and reservoirs upon such lands, a very serious obstacle to highly necessary development might be interposed. So Congress, by departing from the usual language of its right of way grants, whereby grants were made to railroads and for other public purposes over the "public lands" of the United States, clearly indicated its broader purpose by the use of the term "public lands and *reservations* of the United States." Indeed, such has been the interpretation of the Department of the Interior of this act for many years.

In the case of Rio Verde Canal Company, 27 L. D. 421 (opinion of Mr. Secretary Bliss to the Commissioner of the General Land Office, August 25, 1898), it is said:

"The provisions of Section 18, act of Congress of March 3, 1891, granting a right of way through the public lands and reservations of the United States for irrigation purposes, include Indian reservations, subject to the condition that the location and construction of the ditch or canal shall not interfere with the proper occupation of such reservations by the government for Indian purposes and uses."

This opinion further said:

"If the route of a canal through an Indian reservation can be so located as not to interfere with the free use and enjoyment of such reservation by the Indians, there is no reason apparent why such reservation should not be subject to the grant of a right of way as any other reservation, and the executive department



having jurisdiction of such reservation will determine whether it can be so located and will withhold or give its approval accordingly. . . . It is a right inherent in the government by virtue of its sovereignty to authorize the construction of roads and highways through such reservations, although they have been reserved by treaty for the undisturbed use and occupation of the Indians, and the exercise of such right is not a violation of any treaty provision. And further, it is manifest that the purpose of Congress was to grant a right of way through all the public lands and reservations over which it exercised sovereignty, ownership or control, limited only by the condition that such right of way should be so located as not to interfere with the proper occupation by the government of any such reservation."

We are particularly led to the conclusion that Congress intended to include Indian reservations within the language of the act here under consideration for the reason that, by the act of February 15, 1901 (31 Stat. 790, Fed. Stat. Ann. Vol. 6, p. 513), Congress, in conferring authority upon the Secretary of the Interior to grant revocable rights of way for electric power plants, canals, ditches and reservoirs and analogous purposes, specifically included Indian reservations.

The pertinent portion of the language of the act under consideration is:

"That the Secretary of the Interior be and he is hereby authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States . . . for electrical plants . . . and for canals, ditches . . . and reservoirs used to promote irrigation . . . by any citizen, association or corporation of the United States. . . . Provided, that such permits shall be allowed within or through any of said parks or any forest, military, Indian or other reservation only upon the ap-

proval of the chief officer of the department under whose supervision such park or reservation falls, and upon a finding by him that the same is not incompatible with the public interest."

We think the whole scope of the act of 1891, the language used and the purposes to be accomplished, clearly indicate that Indian reservations were intended to be included under the language of the act.

The government, in its brief, contends that inasmuch as no permanent easement is granted thereunder, such act of 1901 offers no support to our theory of the scope of the act of 1891. But it will be readily observed that the two acts differ only in the permanency of the right granted. A permit or license from the Secretary of the Interior under the act of 1901, while unrevoked, is equally efficacious to grant all the rights provided for under the earlier act and both would grant rights which would be equally incompatible with the treaty rights of the Indians, if counsel's contention as to such grant being an invasion of these treaty rights is correct.

Again, Section 13 of the act of Congress of June 25th, 1910, shows the view and policy of the government with reference to reservoir sites upon Indian reservations. The authority therein given to the Land Department is to "reserve from location, entry, sale allotment or other appropriation any lands within any Indian reservation valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress." This section, as observed by appellant in its brief, confers upon the Secretary of the Interior, in his discretion, the right to reserve land within Indian reservations for irrigation projects recognized by Congress, and it is pertinent in this discussion, chiefly as showing the intention of Congress not to permit land, which, from its situation, is valuable in reclaiming

the arid west, even when in Indian reservations covered by treaty rights, to be diverted from the highly important purpose of reclamation.

We hardly think it can or will be contended by the government that Congress was without authority to grant these rights of way over Indian reservations, because it has been the uniform holding of the Supreme Court of the United States that Congress was invested with plenary power over Indian property and could, at will, if it chose, by legislative enactment, abrogate any Indian treaty previously made.

Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. Ed. 183.

Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. Ed. 299.

In the latter case (p. 307, L. Ed.), it is said:

“Indeed the controversy which this case presents is concluded by the decision in Cherokee Nation v. Hitchcock, 187 U. S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property.”

We think the foregoing authorities are clearly sufficient to demonstrate beyond doubt that Congress intended to include Indian reservations within the language of the granting act in question, and we do not for a moment wish to be understood by the court as shifting ground or as being uncertain in the position hitherto taken, in pointing out an additional ground why the present action could not lie. An examination of the complaint and the act in question at once raises the consideration whether or not the determination by the Secretary of the Interior of the jurisdictional facts upon which he acted in making his approval does not now prevent a collateral attack upon that decision. We think it is the law beyond any controversy that the approval by the Sec-

retary of the Interior of a land list or a map granting right of way has the force and effect of a patent.

Jamestown Co. v. Jones, 177 U. S. 125, 44 L. Ed. 698.

Noble v. Union River Logging Co., 147 U. S. 165, 37 L. Ed. 123.

Oregon Short Line R. Co. v. Stalker, 14 Ida. 362.

“The general supervision of the affairs of the Land Department is vested in the Secretary of the Interior, who has final control of the public business relating to the public lands.”

32 Cyc. 1002, and cases there cited.

“The decisions of the Department of the Interior of the land laws are entitled to great respect at the hands of the court and should not be overruled unless they are clearly erroneous, and in cases of doubt a construction placed upon a statute by the Land Department for a number of years, under which grants have been administered and lands put upon the market and sold, is entitled to great weight.”

32 Cyc. 1024.

United States v. Healey, 160 U. S. 136, 40 L. Ed. 369.

Hastings v. Whitney, 132 U. S. 357, 33 L. Ed. 363.

McFadden v. Mountain View Min. Co., 97 Fed. 670.

Hedrick v. Hughes, 15 Wall. 123, 21 L. Ed. 52.

Johanson v. Washington, 190 U. S. 179.

It is shown by the complaint in this action that the Secretary of the Interior gave his unqualified approval to the granting of the right of way easement on June 27, 1903. Under the statute by virtue of which the grant was made, it was clearly provided “that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation.” In any right of way



application, the Secretary of the Interior must, of necessity, determine the question of whether or not it does interfere with the occupation by the government before he can grant his approval to the easement asked. In the case of an Indian reservation, the occupation by the government is for the purpose of a residence and habitude for the Indians and also the occupation by the government itself so far as the administration of the affairs of the Indians is concerned. This occupation is usually in connection with the establishment of schools, agency offices and other supervision. The Bureau of Indian Affairs is under the control and jurisdiction of the Secretary of the Interior. When the Secretary of the Interior has decided by his approval thereof that the granting of any right of way does not interfere with the occupation by the government, he acts in an administrative capacity upon a question of fact which cannot be reviewed by the courts except for fraud or mistake. That determination in the case at bar has settled the question of whether or not the permitting of the reservoir easement has been any infringement of the treaty rights of the Indians. If the granting of the easement in question, as has been judicially determined by the Secretary, does not interfere with the proper occupation of the reservation by the government for the purposes for which it was intended, viz., an Indian reservation for the use of the Indians and in connection with the administration of Indian affairs, it seems to us that the only method by which this action could be reviewed is by a suit to set aside and cancel the vested rights acquired by the company on the approval of the map, with such proper allegations of fraud or mistake as would warrant a court of equity in setting the grant aside.

The government's contention seems to be, in part, that the act of March 3rd, 1891, under which the reservoir grant in question was made, was, by necessary implication, repealed by an act of Congress of May 11th, 1898 (30



Stat. 404), amending an act approved January 21st, 1895, entitled "An act to permit the use of a right of way through the public lands for tramroads, canals and reservoirs and for other purposes" (28 Stat. 635). The act of January 21st, 1895, provides that the Secretary of the Interior be and he hereby is authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through public lands of the United States not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs, to the extent of the ground occupied by the water of the canals or reservoirs and fifty feet on each side of the marginal limits thereof or fifty feet on each side of the center line of the tramroad *by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying, or of cutting timber and manufacturing timber.* It will thus be seen that the scope of this grant is entirely distinct from the grant of March 3rd, 1891, which pertains exclusively to the subject of irrigation, while this act has to do only with mining and quarrying and with the lumber industry. The act of May 11th, 1898, amends the act of 1895 by adding thereto two paragraphs, the first of which simply provides that, in addition to mining, quarrying and lumbering, the tramways, canals or reservoirs for which rights of way may be appropriated, may be used for "the purpose of furnishing water for domestic, public and other beneficial uses." It is doubtless true that this language is broad enough to include the use to which water was to be applied under the act of March 3rd, 1891, but it is clear beyond peradventure that it was not intended thereby to repeal the earlier act, because in the succeeding paragraph it is declared

"That the rights of way for ditches, canals or reservoirs heretofore or hereafter approved under the provisions of sections 18, 19, 20 and 21 of the act of March 3rd, 1891, may be used for purpose of a public nature

and said rights of way may be used for purposes of water transportation, for domestic purposes or for the development of power as subsidiary to the main purpose of irrigation."

So here, in the amendatory act itself, is an express recognition of the fact, not only that rights of way for ditches and canals had theretofore been approved under the earlier act, but that they might thereafter be approved, and surely there could be no subsequent approval, if at the time it was intended that the act conferring the authority to approve should then and there stand repealed. Instead of an intention to repeal the act of March 3rd, 1891, it was clearly the purpose of Congress to leave it intact and to supplement and enlarge its scope by providing that the canals constructed in accordance with its provisions might be used, not only for furnishing water for irrigation purposes, but also for other purposes of a public nature, such as transportation and power, so long as such purposes were subsidiary to the main purpose of irrigation. It would seem that no more need be said upon this contention of the government since the act relied upon as effecting a repeal of the statute of 1891 clearly and by its terms continues such act in force.

But aside from the general merits of the controversy, it is felt that the form of the action by the government and the relief sought herein cannot be effective even to raise the question sought to be decided. It is argued by counsel for the government, in support of its contention, that the right of occupancy of these lands as a part of the Fort Hall Indian Reservation is guaranteed to the Indians by treaty stipulation and by act of Congress, and there is no law authorizing the Secretary of the Interior to grant to the defendant the privilege of using these lands for reservoir purposes. Such being the contention, then, admittedly, no authority exists in any of the executive departments of the government, directly or indirectly, to convey to or confer

upon the defendant any rights to these lands. But it will be readily conceded that the Secretary of the Interior is the officer who has general supervisory authority and control over the Indians. The Secretary of the Interior is the instrumentality whereby the guardianship of the United States over the Indians and their property is made effectual. Then, surely the Department of Justice, at whose instance this suit is brought, and under whose direction it is being prosecuted, has no greater authority to divest the Indians of their right of possession or to alienate the title of the government than has the Department of the Interior, and, without statutory authority, the court which determines this question has no power, indirectly, to accomplish such an end. In that view, if the suit be prosecuted to judgment, and the defendant pays the full amount claimed, what rights does it acquire? If, as is contended, the approval of the Department of the Interior is without efficacy, what would be the efficacy of a judgment obtained through a suit instituted by the Department of the Interior? What protection would the judicial record afford to defendant in error if subsequently the Department of the Interior charged with the duty of protecting the Indians and vindicating their rights should ignore the proceedings of the Department of Justice and should demand that the lands be vacated? According to plaintiff's contention, in Congress alone rests the power to dispose of the land, and Congress, according to its contention, has not authorized any disposition thereof, either by direct sale, or indirectly, through the operation of a judicial decree. If the government's contention is correct in this case, then there is not, nor ever has been, any means whereby reservoir sites or rights of way for canal systems can ever be acquired in the arid states of the west. All the irrigation systems dependent upon reservoir titles acquired under the uniform practice and holdings of the Department of the Interior for twenty years become void, and, not only that, but there is

no method under the statute of the United States whereby, through the payment of compensation to the Indians, or otherwise, such titles can be obtained and set at rest. This is unthinkable. Congress has, by legislation throughout a course of nearly half a century, provided for obtaining rights of way for public purposes through Indian reservations for railroads, telephone and telegraph lines, for tramways, power plants, and, indeed, every public or quasi-public use, and yet, with Indian reservations of the United States located almost entirely in the arid or semi-arid west, and irrigation being the one public use to which the government itself has devoted millions of dollars, thus emphasizing the importance of this public improvement in the Congressional mind, the government now contends that no method whatever has been pointed out whereby rights of way for necessary reservoirs and irrigation canals over such Indian reservations may be obtained. Lands included within Indian reservations cannot be acquired by condemnation because the fee is in the government, and no tribunal has been provided wherein such condemnation suits could be instituted. We cannot think otherwise than that Congress, having plenary power over Indian reservations, intended by the Act of 1891 to grant rights of way over such reservations for irrigation purposes, the exercise of the right being always subject to the approval of the Secretary of the Interior, who was the very officer having the interests of the Indians in charge. No such right of way, under the terms of the act, should "be so located as to interfere with the proper occupation by the government of any such reservation." The Secretary of the Interior, by his approval in the present case, determined the fact that the reservoir in question was not so located as to interfere with such occupation by the government for Indian purposes. If the Secretary of the Interior had any authority whatsoever to approve the application of a canal company for right of way upon an Indian reservation under any circumstances or

upon any conditions, the propriety or wisdom of his approval cannot now be called into question. It is not subject to collateral inquiry. The only question, therefore, is one of jurisdiction, and to hold that the term "reservation of the United States," as used in the Act of 1891, did not include Indian reservations would be to exclude the only class of reservations upon which the grant could, as a practical matter, operate.

We suggest that the judgment of the lower court is in every respect legal, proper and just, and should be affirmed.

Respectfully submitted,

EDWIN SNOW,

*Attorney for Defendant in Error.*















